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IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeal for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Federal Circuit err when it ignored the language and intent of the extensive 1996 amendments made to 28 U.S.C. § 1491, the primary jurisdictional statute of the United States Court of Federal Claims, and failed to recognize in this case the intent of Congress that the entire range of APA based *Scanwell v. Shaffer* procurement cases, including those like the instant case, that had been heard since 1970 in the District Courts, would henceforth be heard in the United States Court of Federal Claims?

PARTIES TO THE PROCEEDINGS

In addition to the petitioner named in the caption, the following parties, who were appellants below, petition this Court for a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit:

American Federation of Government Employees, AFL-CIO, Local 1482, William J. Gately, and Michelle Jo Evans.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 258 F.3d 1294 (Fed. Cir. 2001). (App. 1a-14a.) The opinion of the United States Court of Federal Claims is reported at 46 Fed. Cl. 586 (2000). (App. 15a-44a.)

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 2001. (App. 1a-14a.) The Petition for a Writ of Certiorari was due on October 22, 2001. This Petition was, therefore, timely filed on October 22, 2001. The jurisdiction of this Court is invoked under 28 U.S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1491(b)(1), (App. 45a-47a.), and the language added to that provision by § 12 of the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870, 3874 (1996). (App. 48a-51a.) This case also involves the Office of Management and the Budget Circular No. A-76 and the three procurement statutes pursuant to which it was issued. (App. 54a-62a.)

STATEMENT

A. Background

The Defense Logistics Agency (DLA), a subunit of the United States Department of Defense, operates a warehouse at the Marine Corps facility at Barstow, California. DLA decided to subject the warehouse operation at Barstow to a public-private competition pursuant to Office of Management and Budget Circular No. A-76 (Revised 1999)[hereinafter OMB Circular A-76] and its Supplemental Handbook.[1] (App. 3a-4a.) The goal of such a competition is to decide, based on objective criteria, whether a private company can perform the targeted workload more economically than efficiently organized federal employees who are currently performing the workload. The most cost effective of the

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[1] OMB Circular A-76 was issued pursuant to three federal statutes and has been the primary set of rules for public private competitions in the federal sector for over twenty years.

competing entities wins the right to perform the workload. The competition at Barstow became a contest between the selected most cost effective private contractor, EG&G Logistics, Inc. ("EG&G") and the public bid, which was a costed-out evaluation of the Most Efficient Organization ("MEO") that could be envisioned by DLA for performing the workload with federal civilian employees. (App. 15a, fn.1, 16a.)

Under OMB Circular A-76, ¶ 6-g, and related laws, it was always apparent that the federal employees who were and/or would be performing the workload in question were "directly affected parties" with respect to the A-76 cost comparison. *See* OMB Circular A-76, ¶ 6-g. (App. 57a.) In performing the cost comparison between EG&G and the MEO, DLA permitted several items to be costed too high for the MEO and several items to be costed too low for EG&G. (App. 21a-23a.) Because of these costing and competition improprieties, DLA concluded that EG&G was the low bidder and the workload was awarded to EG&G. An administrative appeal was denied by DLA. (App. 20a-21a.) The instant legal action followed. The two individual plaintiffs worked for DLA in the Barstow warehouse operation and they both would have been employed in the MEO had the MEO been the winning bidder. (App. 16a, fn.2.) Given that EG&G was the winner of the public-private competition, both individual plaintiffs will lose their federal/civil service employment with DLA and will, at best, be offered a job with EG&G paying less in salary and benefits than they would have earned had they worked for DLA as part of the MEO. This will cause serious harm to the plaintiffs and their families. (App. 36a, fn. 21.)

B. Proceedings Below

Plaintiffs, two federal sector civilian employees of the Barstow, California, Defense Logistics Agency (DLA), and their union sought both preliminary and permanent declaratory and injunctive relief with regard to what they

believed was an illegal award of a contract to a private company to operate the DLA warehouse in Barstow. (App. 21a-22a.) They filed their complaint in the United States Court of Federal Claims on March 16, 2000. In essence, their com-plaint alleged that they were entitled to have the agency's decision to award a contract for the operation of the DLA warehouse to private contractor EG&G pursuant to OMB Circular A-76 reversed because, had A-76 procedures been properly followed, the award would have been made to DLA, the public bidder. The complaint and accompanying affidavits established that the individual plaintiffs would have been able to continue their federal careers with DLA had DLA been awarded the workload. (App. 36a.)

A briefing calendar for cross motions for summary judgment was set forth by the trial judge, the briefs were filed and the matter was argued on May 1, 2000. A decision was issued on May 10, 2000, which concluded that the plaintiffs lacked prudential standing and, hence, their complaint was dismissed. (App. 43a-44a.) The court appears to have concluded that the plaintiffs lacked prudential standing under the primary jurisdictional statute alleged, 28 U.S.C. § 1491(b), as well as under general concepts of prudential standing which have evolved in federal district court litigation under 5 U.S.C. § 702, a provision of the Administrative Procedure Act, ("APA"). (App. 29a-34a.) The court examined in detail the legislative history of § 12 of the Administrative Disputes Resolution Act of 1996 ("ADRA"), P.L. No. 104-320, 110 Stat. 3870 (1996), which had amended 28 U.S.C. § 1491(b) so that the Court of Federal Claims would have expanded jurisdiction of contract disputes. The trial court found that this legislative history explicitly directed that the Court of Federal Claims, pursuant to § 12 of the ADRA, was to have jurisdiction of *Scanwell*[2] type cases, which theretofore had

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[2] *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

been heard only by the United States District Courts, added to its contract claims jurisdiction. The trial court explicitly rejected an argument by the government, that the term "interested party" in the newly amended 28 U.S.C. § 1491(b)(1), (App. 46a.), should be held to limit the jurisdiction of the court to actions brought by an "interested party" as that term was used and defined in another procurement related statute, the Competition in Contracting Act ("CICA"), 31 U.S.C. § 3551(2).[3] (App. 32a.)

Thus in reaching its conclusion that the federal employees and their union had not established prudential standing, the trial court, in light of this legislative history, made a specific analysis pursuant to the APA based *Scanwell* line of cases, and concluded that these plaintiffs did not have prudential standing. The court did not decide any other issue. However, it indicated in its decision that it did appear that the plaintiffs had established all of the elements of constitutional standing.[4] The plaintiffs presented evidence to support their claim that the required competition with a realistic and fair cost comparison was not performed by DLA as required by the Federal Activities Inventory Reform Act of 1998, Pub. L. 105-270 (1998), ("FAIR Act") and/or OMB Circular A-76 and that had such a study been properly performed, the MEO, the public bid, would have been the winner. (App. 21a-23a.) The court below did not rule on this issue.

The federal employees and their union filed a notice of appeal on June 6, 2000. They argued, in summary, that the

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[3] That statute defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

[4] "If this court were to reach the issue, however, it would conclude that these plaintiffs satisfy the injury-in-fact test. There is no question but that some union members will lose the opportunity to retain their jobs as members of the MEO because of the cost comparison results. Their job loss is reasonably traced to the alleged errors in the cost comparison and would be redressed if they were to prevail." (App. 36a, fn.2.)

ADRA amended language of 28 U.S.C. § 1491(b) was clear enough on its face to indicate that they had standing since they were interested parties in the public private competition which led to the loss of their jobs. Alternatively, they argued that since the ADRA clearly intended to give the full *Scanwell* jurisdiction of contract disputes to the Court of Federal Claims and since under that line of cases they should have been found to have established prudential standing, such standing should have been found in the instant case. On July 23, 2001, the United States Court of Appeals for the Federal Circuit issued its decision it the case. That court rejected without discussion the argument that the language of the revised statute was clear on its face that the federal employees and their union had standing because they were interested parties in the public private competition which had been held in a manner which violated various procurement statutes and regulations. Finally, the court concluded, without any convincing references, and in direct conflict with the findings of the trial court, that while the legislative history of § 12 of the ADRA mentioned giving the Court of Federal Claims *Scanwell* jurisdiction, it would limit this grant of jurisdiction to only filings by disappointed bidders as opposed to the more expansive APA based jurisdiction that had been established in the United States District Courts under *Scanwell.* Furthermore, the court concluded, without any reference to the statute or its legislative history, that "interested party" as used in § 1491(b)(1) would be taken to mean the same as "interested party" in the CICA, 31 U.S. C. § 3551(2). (App. 1a-14a.)[5]

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[5] Curiously, the court below did not even comment on the numerous Court of Federal Claims decisions, in addition to the decision in this case, which had opined that the words "interested party" in § 1491(b)(1) has a different and broader meaning than the words "interested party" in the CICA. Those cases are listed in *Phoenix Air Group, Inc. v. United States,* 46 Fed. Cl. 90, 101-103 (2000).

REASONS FOR GRANTING THE PETITION

This case merits the Court's review because the Federal Circuit has decided an important question of federal law that has not been but should be settled by this Court.[6] The Federal Circuit has incorrectly decided that the 1996 amendments to the jurisdictional statute of the COFC, with regard to pre and post contract award disputes, 28 U.S.C. § 1491(b), only added post award contract disputes brought by a disappointed bidder, whereas the language of the amendments themselves as well as their legislative history indicate that the full range of Administrative Procedure Act based contract actions that had previously been heard in Federal District Courts was to be heard by the United States Court of Federal Claims. The Federal Circuit is the only circuit court which will review this matter, since it has exclusive jurisdiction of appeals from the COFC. A split in the circuit courts is thus not a possibility. 28 U.S.C. § 1295(a)(3).[7]

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[6] The Federal government enters into contracts valued at over 200 billion dollars per year. The ability of aggrieved individuals and entities to challenge illegalities pertaining to this massive procurement activity and to thus act as a corrective force against these illegalities will be significantly influenced by the improperly circumscribed jurisdiction of the United States Court of Federal Claims ("COFC") articulated in the instant case by the Federal Circuit. *See generally* Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am U. L. Rev. 627, 629-631, 688-690 (2001).

[7] "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction- * * * * * (3) of an appeal from a final decision of the United States Court of Federal Claims."

I. The Federal Employees Who Filed This Action Should Have Been Found To Have Been "Interested part[ies] Objecting to . . . [an] Alleged Violation Of Statute or Regulation In Connection With a Procurement" As That Phrase Was Used By Congress In Crafting 28 U.S. C. § 1491(b)(1) In § 12 of the Administrative Dispute Resolution Act of 1996.

The 1996 ADRA amended language of § 1491(b)(1), without any reference to the legislative history of ADRA, gives the plaintiffs in this case the right to have the merits of their case heard. Clearly the plaintiffs here, federal employees who would lose their federal jobs and livelihood if the contract was awarded to EG & G, were "interested part[ies] objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." [8] When legislative language is clear on its face, as it is here, there is no reason to scrutinize the legisla-

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[8] § 1491(b)(1) states in pertinent part that the COFC "shall have jurisdiction to render judgment on an action by an interested party objecting to . . . the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." In *The American College Dictionary*, Random House, 1955 edition, the first two meanings of the word "interested" are as follows: "1. Having an interest in something; concerned; 2. Participating; having an interest or share; having money involved." It seems obvious that employees who have been involved in formulating the Most Efficient Organization, who have been kept advised of the A-76 process and the public private competition pursuant to statute, i.e., 10 U.S.C. § 2467(b), who might lose their jobs, federal careers and financial resources as the result of such competition, and who are explicitly identified as "directly affected parties" by OMB Circular A-76 itself, meet both of these definitions of the word "interested." While it could be argued that in a legal sense they are not themselves bidders in the competition, OMB Circular No. A-76 itself refers to them as "directly affected *parties*" (emphasis added). (App. 57a, ¶ g.)

tive history. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). This argument was made by the federal employees to the court below and was rejected without explanation. (App. 8a-9a).

II. The Court Below Misinterpreted The Language And Legislative History of Amended 28 U.S.C. § 1491(b) By Ignoring The Directive From Congress That The Purpose of The Amended Language Was To Empower The United States Court of Federal Claims With Full Jurisdiction of All of The Contract Protests And Related Matters That Had Been Heard In Federal District Courts Since 1979 Pursuant To *Scanwell Laboratories, Inc. v. Schaffer*, 424 F.2d 859 (D.C. Cir. 1970).

The United States Court of Federal Claims, the trial court here, concluded in this case that while 28 U.S.C. § 1491(b)(1) as amended in 1996 did manifest an intent to give that court both pre-existing COFC pre contract award jurisdiction and APA based post contract award jurisdiction, the post contract award claims of the federal employees and their union in this matter did not reflect that these plaintiffs had "prudential standing" under the applicable APA criteria. On appeal the employees and their union argued that by referring directly to the language chosen by Congress in 1996, they were entitled to have their claims heard since they were clearly "interested part[ies] . . . objecting to a violation of statute or regulation in connection with a procurement" which followed the OMB A-76 public private cost competetion action that they allege was performed illegally. Alternatively, the employees and their union argued that under an APA analysis of prudential standing, as engaged in by the trial court after it had set forth an extensive review of the legislative history of the 1996 ADRA amendments, they should have been found to have met the standard for prudential standing, as articulated by the Supreme Court, since they were within the zone of interest of

the three statutes upon which OMB Circular A-76 was issued and other related laws and regulations.[9]

In addition the employees and their union argued that the pre ADRA *Scanwell* line of cases included at least one district court case that found that plaintiffs like them did have "prudential standing" and that hence under the amended § 1491(b)(1) they should have been found to have "prudential standing."

The Federal Circuit disagreed with the court below's careful and correct analysis of the legislative history of the ADRA and concluded that only part of the APA based post contract award jurisdiction which had existed in the United States District Courts under *Scanwell* was covered in amended 28 U.S.C. § 1491(b)(1). According to the Federal Circuit, only disappointed bidders as defined by the CICA could bring post contract award actions in the COFC under the amended statute.[10] Since the employees and the union

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[9] OMB Circular A-76 was issued pursuant to three statutes: the Budget and Accounting Act of 1921 (31 U.S.C. §§ 1 *et seq.*); the Office of Federal Procurement Policy Act Amendments of 1979, (41 U.S.C. §§ 401 *et seq.*), and the FAIR Act. It has been adopted by reference in various statutes and regulations. *See* e.g. 10 U.S.C. § 2467(b) and 32 C.F.R. §§ 169 and 169a. In an exhaustive analysis of the statutory basis of OMB Circular A-76 the Sixth Circuit has found it to be "law to apply" for purposes of an action brought pursuant to the APA. *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991), *petition for rehearing en banc denied*, 961 F.2d 97 (6th Cir. 1992). On remand in that case the District court concluded that the federal employees and their union did have "prudential standing" under the APA to challenge a contract award made pursuant to an OMB Circular A-76 public-private competition. (App. 63a-73a.) *See supra*, III .

[10] While there are several clear references in the legislative history to adding the *Scanwell* jurisdiction to the COFC's jurisdiction, there is absolutely no mention of tailoring the new statute's jurisdictional contours to conform to the jurisdiction under CICA or to the General Accounting Office, GAO, line of cases issued pursuant thereto. 142 Cong. Rec. § 11848-50. (App. 84a-85a.) The Federal Circuit's adoption of the CICA

were not disappointed bidders, the Federal Circuit reasoned, the plaintiffs clearly had no right to proceed under 28 U.S.C. § 1491(b)(1).[11]

The federal employees and the union which brought this case in the Court of Federal Claims asserted in the court below that they should have been found to have standing under ADRA amended 28 U.S.C. § 1491(b)(1), which was intended by Congress to give to both the Court of Federal Claims and the United States District Courts congruent and broadened jurisdiction of both pre and post contract award claims for four years. After four years, i.e., as of January 1, 2001, if Congress took no action, the jurisdiction of the United States District Courts was to expire. *See* § 12(d) of the ADRA.[12] (App. 50a.)

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jurisdictional standard is in direct conflict with the legislative history of § 1491(b)(1) and finds no support in the language of the statute itself.

[11] The Federal Circuit made no APA based analysis of standing and completely ignored the APA "prudential standing" analysis of the trial court that had been challenged on appeal by the plaintiffs.

[12] Congress took no action, so as of that date the COFC has had exclusive jurisdiction of all of the *Scanwell* cases that had previously been heard by the district courts. *Emory Worldwide Airlines, Inc. v. United States*, __F.3d__, 2001WL 995322 (Fed. Cir. August 31, 2001)(No. 01-5075), at WL page number 7. ("Consequently, it is clear that the Court of Federal Claims is the only judicial forum (sic) to bring any governmental contract procurement protest.")

III. The Court Below's Misreading of 28 U.S.C. § 1491(b)(1) Comprehensively Concluded That Only An "Interested Party" As Narrowly Defined In the Competition in Contracting Act, 31 U.S.C. § 3551(2), Could Proceed Before It and Thus It Failed To Recognize That Full *Scanwell* Jurisdiction Had Been Imparted to the COFC by Congress In The ADRA, And That Under That *Scanwell* Jurisdiction Plaintiffs Like The Plaintiffs Here, Had Been Found To Have "Prudential Standing." [13]

The court below was the first appellate court to be presented with the question of what meaning to give to the recently amended 28 U.S.C. § 1491(b)(1).[14] The court did not simply conclude that the employees and the union in this

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[13] A useful history of government contracting law and the importance of the now expired APA based jurisdiction of the United States District Courts to review complaints regarding contract awards can be found in Mason, *Bid Protests and the U.S. District Courts—Why Congress Should not Allow The Sun To Set On This Relationship,* 26 Pub. Cont. L.J. 567, 568-574. ("As the sole Article III judicial forum that reveiws government procurement decisions, the U.S. District Courts (district courts) have been deciding procurement complaints under the authority of the Administrative Procedure Act (APA) for more than twenty-five years." *Id.* at 569). The ADRA amendments to § 1491(b) included a sunset provision which stated that absent new legislation during a four year experimental period during which both the COFC and the district courts would both have comprehensive jurisdiction of these matters, the jurisdiction of the United States Districts Courts to hear any of these matters would expire on January 1, 2001. No legislation with reference to this issue was passed during this time period. Hence, at the present time, only the COFC has jurisdiction of these matters.

[14] The Federal Circuit will be the only Circuit Court presented with this issue, since § 1491(b)(1) defines the type of contract award matters that can be filed against the United States in the COFC and all appeals from the COFC are heard by the Federal Circuit. § 12 of the ADRA dramatically amended this statute in 1996.

specific case were not "interested parties" as that term was used in the amended statute, but rather comprehensively concluded, after only a surface review of the legislative history of the statutory language,[15] that "Congress intended to extend the jurisdiction of the Court of Federal Claims to include only post-award bid protest cases brought under the APA by disappointed bidders, such as the actual plaintiff in *Scanwell*." (App. 11a-12a.)

The court below ignored several very significant matters that, when properly considered, indicate that Congress intended a very broad grant of jurisdiction to the COFC under the amendments of the ADRA in 1996. In the first place, the legislative history includes an unequivocal Conference Committee Report which was issued after the different versions of this statute were passed by the House and Senate. H.R. Conf. Rep. No. 104-841, at 10 (1996) ("It is the intention . . . to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims.") (App. 79a.) The cases which had been "previously subject to review in the federal district courts" were those that followed the line of analysis set forth in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). *Scanwell* was a seminal finding that under the APA, 5 U.S.C. § 701 *et seq.*, any party suffering injury as the result of an illegality connected to an award of a contract by the federal government was entitled to seek

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[15] The trial court in this matter, in contrast, comprehensively studied the legislative history of the 1996 amendments made to 28 U.S.C. § 1491(b) and concluded that "[i]n construing the ADRA, this court would fail to give effect to the language of the statute, as well as Congress' clearly stated intent to grant coequal forums, if it excluded parties who previously would have had standing to bring a bid protest action in the federal district courts under the APA from the scope of 'interested party' under the ADRA." (App. 32a.) In accord: *CHE Consulting, Inc. v. United States*, 47 Fed. Cl. 331, 338-339 (2000).

relief. *See* Mason, *supra*, at 573. ("In 1970 the D.C. Circuit extended the Superior Oil rationale to a bid protest in its monumental decision in *Scanwell Laboratories, Inc. v. Shaffer.*")

In deciding that Congress must have meant that only the type of plaintiff that existed in *Scanwell* itself, i.e., a disappointed bidder, was to be given the right to sue in the COFC under the amended § 1491(b)(1), because that section represented a waiver of sovereign immunity, the Federal Circuit was clearly misguided. (App. 12a.) *Scanwell* jurisdiction was added to the jurisdiction of the COFC, and *Scanwell* was already based on the APA, which in its own right is an explicit waiver of sovereign immunity. Therefore, to interpret the grant of the *Scanwell* jurisdiction in the ADRA narrowly, i.e., only to the type of plaintiff that existed in *Scanwell,* misses the point that everything that was included in the *Scanwell* jurisdiction had already been circumscribed by the district courts in their application of the APA, which itself was a waiver of sovereign immunity.[16]

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[16] Over the years since 1970, district courts have found numerous types of plaintiffs, other than disappointed bidders, to have prudential standing to obtain judicial review of post award contract actions pursuant to the APA based analysis of *Scanwell. See e.g. Ballerina Pen Company v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970)(A decision by the government to award a contract with no competition was allowed to be challenged by a contractor who would have been a bidder had there been a competition.); *Contractors Eng's Int'l v. Department of Veterans Affairs*, 947 F.2d 1298, 1300 (5th Cir. 1991)(Holding that whether subcontractor has standing to challenge agency action depends on whether plaintiff has standing under traditional APA standing requirements.); *American Federation of Government Employees, Local 2119 v. Cohen*, 171 F.3d 460 (7th Cir. 1999)(Federal employees and their union found to have prudential standing under a *Scanwell* APA analysis to challenge the outsourcing to a private company of the production of certain armaments without any competition even though a statute appeared to require that said armaments be produced by those federal employees if they could do it less expensively.)

In addition, the court below totally ignored the reality that had Congress wanted to define the new jurisdiction of the COFC narrowly with regard to the post award *Scanwell* actions that it was adding to the COFC's jurisdiction, so that it conformed to the concept of "interested party" as that term was defined under CICA, it could easily have explicitly done so. It did not. In addition, the language it did choose is very expansive and is a closer fit to § 702 of the APA than it is to the narrow definition under CICA.[17] Thus, the language gives the right to file in the COFC to an "interested party objecting to . . . any alleged violation of statue or regulation in connection with a procurement or a proposed procurement."[18]

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[17] The court below suggested that, because Congress used the term "interested party" in the ADRA amendment to § 1491(b)(1), it would be reasonable to assume that Congress expected the definition of that term in the CICA to also apply to the use of that term in § 1491(b)(1). (App. 13a-14a.) This conclusion is not logical. § 1491(b)(1) does not mention the CICA definition, and furthermore the statement of who may bring suit in § 1491(b)(1) is not in any way similar or parallel to the definition of "interested party" found in the CICA. 31 U.S.C. § 3551(2). *See* Claybrook, *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions-Learning Lessons All Over Again*, 29 Pub. Cont. L.J. 1, 45-49, 47 (1999). ("Fourth, the term 'interested party' is not so peculiar that it must be afforded the CICA statutory definition or none at all. To the contrary, the logical interpretation is that it means the same as the APA's 'adversely affected or aggrieved party,' i.e., a party with standing to complain about the agency's decision as Congress defined it in the APA."). The afore cited article sets forth a detailed and reasoned analysis as to why the COFC "should review standing under the APA standard" in effectuating amended § 1491(b)(1). *Id.* at 45-49.

[18] The employees did argue below that since under OMB Circular A-76 they are explicitly identified as "directly affected parties" in an A-76 competition such as the one held in the instant case, and since they also clearly have the right to administratively appeal the outcome of the A-76 competition, they should also be entitled, directly under this language of

Finally, had the Circuit Court properly recognized that the full APA based *Scanwell* jurisdiction was included in the jurisdictional grant in § 1491(b)(1), as did the trial court,[19] it should then have recognized that under the decision in *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991), *petition for rehearing en banc denied*, 961 F.2d 97 (6th Cir. 1992), and the decision on remand in that case, *Diebold v. United States*, Civil Action No. C90-0001-L(A), W.D. Kentucky, April 12, 1993, unpublished, (App. 63a-73a.), the federal employee plaintiffs and their union here, who are in all ways similarly situated to those in *Diebold*, did have "prudential standing" to pursue this matter: "We believe the interests the complaint herein seeks to protect are squarely within the interests to be served by the legislation." *Id.* at p. 10. (App. 69a.)

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§ 1491(b)(1) , to pursue this matter on the merits without any reference to the acquired *Scanwell* jurisdiction or to the APA.

[19] The trial court concluded that the full *Scanwell* APA based jurisdiction had been transferred to the COFC; however, it ignored the holding in *Diebold*, on remand, which found that similarly situated employees to those in the instant case and their union, did have prudential standing to pursue their case because they were within the zone of interest of OMB Circular A-76 and the statutes pursuant to which it was issued. The trial court's APA analysis was flawed in that it looked at only the most recently promulgated of the three statutes upon which OMB Circular A-76 is based, the FAIR Act, and concluded that its language and legislative history did not show an intent to grant standing to federal employees. This analysis ignored the holdings of this Court that a plaintiff can be in the "zone of interest" of a statute for APA prudential standing purposes even if there is no mention of such type plaintiff or the benefitting of such type plaintiff in that statute. *National Credit Union Administration v. First National Bank and Trust*, 522 U.S. 479, 499 (1998); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). The Circuit Court did not rule on this aspect of the employees' appeal since it incorrectly concluded that the full *Scanwell* APA based jurisdiction had not been transferred to the COFC by the ADRA amendments to § 1491(b)(1).

Since the Federal Circuit's analytical approach incorrectly rejected using a *Scanwell* based APA approach as mandated by Congress, it totally avoided the necessity of reviewing and overturning the trial court's erroneous understanding of the pre ADRA *Scanwell* caselaw.[20] The granting of this petition will enable the Court to correct a serious misreading of an important jurisdictional statute which now pertains to all court litigation regarding protests of contracts entered into by the federal government. Upon full consideration by this Court the misreading of the language of § 1491(b)(1) by the Federal Circuit should be overturned and corrected. This matter should then be remanded to that court with directions to perform an APA based *Scanwell* analysis of the COFC's decision.

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[20] The plaintiffs in *Diebold v. United States*, *supra*, were federal employees who had lost their job, like those here, because of an improperly effectualed OMB Circular A-76 public private competition. On remand in *Diebold* in 1995 the district court concluded, pursuant to a standard APA based analysis under *Scanwell*, that those employees and their union did have "prudential standing" to have their case heard and it ruled in their favor on the merits. Since Congress' intent in drafting § 1491(b)(1) was to empower the district courts and the COFC to hear "the full range of cases previously subject to review in either system," 142 Cong. Rec. S11849((daily ed. Sept. 30, 1996)(statement of Sen. Levin), (App. 89a.), finding that the plaintiffs here have prudential standing is fully in conformity with Congress' intent in its 1996 amendments to § 1491(b)(1). While there are pre ADRA *Scanwell* cases which had held to the contrary, *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989)(split decision), *cert. denied*, 496 U.S. 936 (1990), the "full range of cases previously subject to review" as of 1996, when the ADRA amended § 1491(b)(1), would have to include the 1995 ruling in *Diebold*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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October 22, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 00-5090

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, American Federation of Government Employees, local 1482, William J. Gately and Michelle Jo Evans,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: July 23, 2001

Before NEWMAN, LOURIE, and SCHALL, *Circuit Judges*.

SCHALL, *Circuit Judge*.

The American Federation of Government Employees, AFL-CIO, the American Federation of Government Employees, Local 1482, William J. Gately, and Michelle Jo Evans (collectively, "Appellants") appeal the decision of the United States Court of Federal Claims that dismissed their complaint for lack of standing. *Am. Fed'n Gov't Employees, AFL-CIO v. United States*, 46 Fed. Cl. 586 (2000) ("*AFGE*"). The court determined that Appellants lack standing to challenge a cost comparison analysis of the Defense Logistics Agency ("DLA") because their interests do not come within the zone of interests protected by either the Federal Activities Inventory Reform Act ("FAIR"), P.L. No. 105- 270, 112 Stat.

2382 (1998), *reprinted in* 31 U.S.C. § 501 (Historical and Statutory Notes), or 10 U.S.C. § 2462 (1994). Because we determine that Appellants lack standing under 28 U.S.C. § 1491(b)(1), we affirm the decision of the Court of Federal Claims, but on a different ground.

BACKGROUND

I.

The FAIR requires executive agencies to identify the activities they perform that are not "inherently governmental functions." FAIR, § 2(a). Each year, the head of each agency must submit a list to the Office of Management and Budget ("OMB") of all such activities (a "FAIR list"). *Id.* The FAIR also requires that when an agency considers contracting with a private sector source for the performance of such an activity, it must select the source using a competitive process that includes a "realistic and fair" cost comparison analysis. *Id.* § 2(d), (e). The FAIR provides that certain parties, including employees of an organization within an executive agency that is performing or that might perform the activity, as well as labor organizations that include such employees in their membership, may bring an administrative challenge to the "omission of [the] particular activity from, or [the] inclusion of [the] particular activity on, a [FAIR] list." *Id.* § 3(a), (b).

Since a date prior to the enactment of the FAIR, OMB Circular No. A-76 ("OMB A-76") has governed the performance of commercial activities by executive agencies. OMB A-76 reflects the view that "the [g]overnment should not compete with its citizens" and that "it has been and continues to be the general policy of the [g]overnment to rely on commercial sources to supply the products and services the [g]overnment needs." OMB A-76 provides that "the [g]overnment shall not start or carry on any activity to provide a commercial product or service if the product or

service can be procured more economically from a commercial source." OMB A-76 requires agencies to perform cost comparison analyses to determine whether a commercial product or service should be provided by the agency or by a private sector source. In performing a cost comparison analysis, the agency is to compare the bid of the private sector source with the cost of providing the good or service with government facilities and personnel (the agency's "Most Efficient Organization" or "MEO").[1] OMB A-76 provides for the administrative review of cost comparison decisions, and permits federal employees who would be affected by the decision, as well as their representatives, to seek such review. The provisions of OMB A-76 are consistent with the FAIR and OMB A-76 has remained in effect since enactment of the FAIR.

II.

On April 30, 1999, the DLA issued a solicitation for bids for the performance of defense material distribution services ("depot services") at the Defense Distribution Depot in Barstow, California. The solicitation was issued in support of a cost comparison study conducted under OMB A-76. The cost comparison study was designed to determine whether the depot services could be performed more economically by a private sector source or by the DLA's MEO.

The DLA determined that EG&G Logistics, Inc. ("EG&G") won the competition among private sector sources because EG&G had submitted the lowest- priced, technically acceptable proposal. Accordingly, the DLA proceeded to compare EG&G's bid to that of the MEO. While this comparison process was pending, Congress enacted the

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[1] The MEO is not necessarily an existing organization, "but is the organization the agency would establish if it were competing for the work." *AFGE*, 46 Fed. Cl. at 588 n. 1.

FAIR. Pursuant to the FAIR, the DLA listed the depot services on its FAIR list.[2]

On January 5, 2000, the DLA determined that EG&G's bid was about $2.5 million lower than the MEO's; accordingly, the DLA tentatively decided to contract out the depot services to EG&G. Appellants William J. Gately and Michelle Jo Evans are federal employees who allege that they will be part of the MEO if the depot services are performed by the DLA but will be displaced if the depot services are contracted out to EG&G. The union appellants represent Mr. Gately and Ms. Evans and other similarly situated federal employees. Pursuant to OMB A-76, Appellants and EG&G submitted administrative appeals of the cost comparison decision to the DLA Appeal Authority. As a result of these appeals, the cost comparison was recalculated, but EG&G's bid remained lower than that of the MEO by about $2.2 million. Accordingly, the Appeal Authority upheld the tentative decision to award the contract to EG&G.

III.

Appellants filed suit in the Court of Federal Claims to challenge the Appeal Authority's decision. Appellants argued that the DLA had failed to conduct a proper price comparison as required by OMB A-76, by § 2(e) of the FAIR, and by 10 U.S.C. § 2462(b).[3] The government moved to dismiss the complaint, arguing that Appellants do not have standing to challenge the cost comparison decision in the Court of Federal Claims.

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[2] It does not appear from the record that Appellants challenged the inclusion of the depot services on the DLA's FAIR list.

[3] 10 U.S.C. § 2462 requires the Department of Defense to obtain certain supplies and services from the private sector if a cost comparison analysis indicates that a private source can provide the supply or service at a lower cost.

The court considered whether Appellants have standing under 28 U.S.C. § 1491(b)(1), which gives the Court of Federal Claims jurisdiction over bid protest cases. *AFGE*, 46 Fed. Cl. at 591. The relevant language in that statute provides that the court has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (Supp. V 1999). Because the statute does not define an "interested party," the court looked to its legislative history to determine whether Congress intended the term to include federal employees such as Appellants. *AFGE*, 46 Fed. Cl. at 592-97.

The court noted that, prior to the enactment of § 1491(b)(1), the Court of Federal Claims had jurisdiction over only pre-award bid protest cases, while federal district courts had jurisdiction over post-award bid protest cases. *Id.* at 592-93. The court determined that the prior jurisdiction of the Court of Federal Claims was based on 28 U.S.C. § 1491(a) and, therefore, was limited to claims "'founded upon . . . any express or implied contract.'" *Id.* at 593 (quoting 28 U.S.C. § 1491(a) (1994)). Thus, "[d]isappointed bidders were the only parties who had standing to bring a bid protest" in the Court of Federal Claims. *Id.* The court determined that the prior jurisdiction of the district courts was based on the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706. *Id.* (citing *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C.Cir.1970) (holding that a disappointed bidder could challenge the award of a government contract in a district court pursuant to the APA)). The court noted that standing under the APA is governed by 5 U.S.C. § 702, which confers standing on "'a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Id.* (quoting 5 U.S.C. § 702

(1994)). The court stated that "[t]he requirements for establishing standing under the APA are well settled. Claimants . . . must demonstrate that: (1) they have suffered sufficient 'injury-in-fact;' (2) that the injury is 'fairly traceable' to the agency's decision and is 'likely to be redressed by a favorable decision;' and (3) that the interests sought to be protected are 'arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" *Id.* at 595 (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (third alteration in original)).

The court determined that one purpose behind § 1491(b)(1) was to give the Court of Federal Claims and the district courts concurrent jurisdiction over all bid protest cases, so that "both courts [could] hear 'the full range of cases previously subject to review in either system.'" *Id.* at 593 (quoting 142 Cong. Rec. S11849 (daily ed. Sept. 30, 1996) (statement of Sen. Levin)). The court therefore reasoned that "interested parties" in § 1491(b)(1) should be interpreted as including everyone "who had standing in either court under each forum's [prior] jurisdiction over bid protest cases." *Id.* at 593, 595. Thus, although Appellants would not have had standing under § 1491(a), the court reasoned that they might have standing under § 1491(b)(1) if they "would have had standing in [a] federal district court under the APA." *Id.* at 595.

The court proceeded to apply to the Appellants the three-part test for standing under the APA. The court did not decide whether Appellants meet the "injury-in-fact" or "traceability" prongs because it determined that they are not within the zone of interests that either the FAIR or 10 U.S.C. § 2462 are designed to protect. *Id.* at 597-600. The court concluded that Appellants "cannot establish standing under the APA and therefore are not 'interested parties'" under § 1491(b)(1). *Id.* at 600. The court therefore granted the government's motion to dismiss Appellants' complaint for lack of standing.

Appellants appeal the dismissal to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

"Whether a party has standing to sue is a question that this court reviews *de novo*." *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1376 (Fed.Cir.2000). The precise question presented by this appeal, whether federal employees or their union representatives have standing to challenge an executive agency cost comparison decision in the Court of Federal Claims, is one of first impression.

Our analysis begins with the language of the statute on which the jurisdiction of the Court of Federal Claims is based:

> (b)(1) Both the Unites [sic] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.
>
> (2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.
>
> (3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

> (4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

28 U.S.C. § 1491(b). As recognized by the parties and by the Court of Federal Claims, the statute confers standing on "an interested party objecting to a solicitation by a Federal agency," but does not further define who is encompassed by the term "interested party."

Appellants argue that the term should be construed according to its ordinary dictionary definition, and that they are "interested parties" because they stand to lose their jobs if the depot services are contracted out to EG&G. Alternatively, Appellants argue that "interested party" should be interpreted as encompassing parties who satisfy the APA requirements for standing, and that they satisfy those requirements because they fall within the zone of interests protected by OMB A-76 and the FAIR.[4]

The government argues that "interested party" should be construed in accordance with a related statute, the Competition in Contracting Act ("CICA"), 31 U.S.C. §§ 3551-56. The CICA governs the bid protest jurisdiction of the General Accounting Office ("GAO"), and defines the term "interested party" as follows:

> The term "interested party", with respect to a contract or a solicitation or other request for offers . . . . means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

31 U.S.C. § 3551(2) (Supp. IV 1998).

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[4] Although the Court of Federal Claims' decision primarily addresses whether appellants are within the zone of interests of the FAIR, Appellants' arguments focus on whether they are within the zone of interests of OMB A-76.

Because the plain language of the statute does not resolve this issue, we look to the legislative history of § 1491(b)(1) for an indication of congressional intent. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991). The statute was enacted as part of the Administrative Disputes Resolution Act of 1996 ("ADRA"), P.L. No. 104-320, 110 Stat. 3870 (1996). Senator Cohen, who offered the bid protest provision at issue as an amendment to the pending ADRA legislation, described the provision as "expand[ing] the bid protest jurisdiction of the Court of Federal Claims." 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996) (statement of Sen. Cohen). He explained that, without the legislation, the court only had jurisdiction over pre-award bid protests and that the bill would give the court "both pre and post-award jurisdiction." *Id.* He noted that *Scanwell* "held that a contractor can challenge a Federal contract award in Federal district court under the [APA]," and described problems he saw with the concurrent jurisdiction of the Court of Federal Claims and district courts over bid protests. *Id.* He explained that the bid protest provision included a sunset clause which would repeal the "district courts' *Scanwell* jurisdiction." *Id.* Senator Levin, who, together with Senator Grassley, had introduced the ADRA legislation, commented on the problems of concurrent jurisdiction over bid protests, and remarked that the Acquisition Law Advisory Panel had recommended that there should be only one forum for bid protests. *Id.* at S11849 (statement of Sen. Levin). He described the bid protest provision of the ADRA as "consolidat[ing] the jurisdiction of the Court of Federal Claims and the district courts," such that before the sunset provision took effect, "[e]ach court system would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system." *Id.* Then, after the sunset provision took effect, "the jurisdiction of the district courts would terminate, and the Court of Federal Claims would exercise exclusive judicial jurisdiction over procurement

protests." *Id.* at S11849- 50. *See also* H.R. Conf. Rep. No. 104-841, at 10 (1996) ("It is the intention . . . to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims.").

This legislative history indicates that Congress intended to confer on the Court of Federal Claims jurisdiction previously exercised only by district courts under *Scanwell.* The question is what Congress meant when it referred to "*Scanwell* jurisdiction." As discussed above, prior to the ADRA, the Court of Federal Claims had jurisdiction over only pre-award protests, while, under *Scanwell,* the district courts had jurisdiction over post-award protests. The ADRA gave the Court of Federal Claims jurisdiction over post- award protests. Thus, the ADRA clearly conferred the Court of Federal Claims with "*Scanwell* jurisdiction" inasmuch as it permitted the Court of Federal Claims to hear post-award protests. Moreover, while pre-ADRA protests brought in the Court of Federal Claims were governed by a narrow standard of review, *see Keco Indus., Inc. v. United States,* 203 Ct.Cl. 566, 492 F.2d 1200, 1203- 04 (1974), the ADRA expressly made the APA standard of review applicable to all bid protest actions, 28 U.S.C. § 1491(b)(4). *Impresa Construzioni Geom. Domenico Garufi v. United States,* 238 F.3d 1324, 1331-33 (Fed.Cir.2001).

The issue presented by this appeal, however, is whether Congress intended to expand the class of parties who can bring bid protest actions in the Court of Federal Claims.[5] On

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[5] *Impresa* presented the issue of whether a bidder who had been eliminated by the contracting officer from the competitive range of bids due to unacceptable technical proposals had standing to bring a bid protest action under the current version of § 1491(b)(1). *Impresa,* 238 F.3d at 1333-34. In deciding that issue, we stated that we were not required to "resolve whether the 1996 amendments [to the statute] have liberalized

the one hand, Congress could have intended the Court of Federal Claims' "*Scanwell* jurisdiction" to encompass complaints brought by disappointed bidders only. The vast majority of cases brought pursuant to *Scanwell* were brought by disappointed bidders. *Scanwell* itself involved a disappointed bidder, and the Court of Appeals for the D.C. Circuit has characterized *Scanwell* as holding "that a disappointed bidder on a government contract was a person aggrieved under the APA and had standing to seek a limited review of the contract award." *Int'l Eng'g Co. v. Richardson,* 512 F.2d 573, 579 (D.C.Cir.1975). *See also Free Air Corp. v. FCC,* 130 F.3d 447, 450 (D.C.Cir.1997) (describing *Scanwell* and other cases as holding that "sufficiently viable runners-up in a procurement process have standing to allege that an illegality in the process caused the contract to go to someone else"). This court also has described *Scanwell* standing narrowly. *Southfork Sys., Inc. v. United States,* 141 F.3d 1124 (Fed.Cir.1998) ("The essence of 'the *Scanwell* doctrine,' which Congress intended 28 U.S.C. § 1491(a)(3) to make applicable to the Claims Court, is that an unsuccessful bidder has standing to challenge a proposed contract award. . . ."). Thus, in conferring the Court of Federal Claims with "*Scanwell* jurisdiction," Congress may have intended the court to exercise jurisdiction over disputes brought by disappointed bidders only.

On the other hand, because *Scanwell* itself is based on the APA, Congress could have intended to give the Court of Federal Claims jurisdiction over any contract dispute that could be brought under the APA. Because the language of

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the standing requirements by adopting the APA standard," because we determined that the bidder had "an economic interest" in the contract award and, therefore, satisfied even "the more stringent ... standard" of the CICA. *Id.* at 1335. *Impresa* therefore did not resolve the question before us today.

5 U.S.C. § 702 is quite broad,[6] parties other than actual or prospective bidders might be able to bring suit. *See, e.g., Ballerina Pen Co. v. Kunzig,* 433 F.2d 1204 (D.C.Cir.1970) (determining that an incumbent contractor had standing to challenge an agency's award of a contract to the National Industries for the Blind under the APA even though it was not a disappointed bidder because the agency had not awarded the contract through the traditional bid system).

In resolving this issue, we are guided by the principle that waivers of sovereign immunity, such as that set forth in § 1491(b)(1), are to be construed narrowly. *See, e.g., McMahon v. United States,* 342 U.S. 25, 27, 72 S.Ct. 17, 96 L.Ed. 26 (1951) ("[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign."). With that principle in mind, we interpret the references in the legislative history to the "*Scanwell* jurisdiction" of the district courts as references to the district courts% jurisdiction over bid protest cases brought under the APA by disappointed bidders, like the plaintiff in *Scanwell.* This interpretation is supported by the legislative history of the ADRA, which describes *Scanwell* as permitting "a *contractor* to challenge a Federal contract award." 142 Cong. Rec. S11848 (statement of Sen. Cohen) (emphasis added). It also is supported by the narrow reading courts have given standing under *Scanwell,* as discussed above. When construed in this manner, the legislative history of § 1491(b)(1) suggests that Congress intended standing under the statute to be limited to disappointed bidders.

The language chosen by Congress, while not unambiguous, supports this construction. When defining standing under

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[6] The relevant part of the statute provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

§ 1491(b)(1), Congress did not use the broad language of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," 5 U.S.C. § 702. In addition, Congress did not explicitly invoke the APA standing requirements, although it did explicitly invoke the APA standard of review. *See* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."). We therefore are not convinced that Congress, when using the term "interested party" to define those who can bring suit under § 1491(b)(1), intended to confer standing on anyone who might have standing under the APA.

The term Congress did choose to define standing under § 1491(b), "interested party," is a term that is used in another statute that applies to government contract disputes, the CICA. As set forth above, the CICA explicitly defines that term as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2). Section 3551, by its own terms, applies only to contract disputes decided by the Comptroller General of the GAO pursuant to 31 U.S.C. §§ 3551-56. However, the fact that Congress used the same term in § 1491(b) as it did in the CICA suggests that Congress intended the same standing requirements that apply to protests brought under the CICA to apply to actions brought under § 1491(b)(1). We therefore construe the term "interested party" in § 1491(b)(1) in accordance with the CICA, and hold that standing under § 1491(b)(1) is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract. This construction is consistent with the legislative history of § 1491(b)(1), which, as discussed above, indicates that Congress intended to extend the jurisdiction of the Court of Federal Claims to include post-award bid protest cases

brought under the APA by disappointed bidders, such as the plaintiff in *Scanwell.*

Because Appellants here are not actual or prospective bidders or offerors, they do not have standing to challenge the DLA's cost comparison analysis or its decision to award the depot services contract to EG&G.

CONCLUSION

For the foregoing reasons, the order of the Court of Federal Claims dismissing Appellants' claim for lack of standing is

AFFIRMED.

COSTS

Each party shall bear its own costs.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-130C

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, American Federation of Government Employees, AFL-CIO, Local 1482, William J. Gately, and Michelle Jo Evans,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

May 10, 2000.

OPINION

FIRESTONE, *Judge*.

This case arises from a solicitation issued by the Defense Logistics Agency ("DLA") for a contract to operate three DLA material distribution depots. The solicitation was part of a two-step process aimed at determining whether the services described in the solicitation could be performed more economically by a private contractor when compared to the costs of the DLA's in-house personnel ("MEO") [1] performing

[1] The MEO or "most efficient organization" is not the existing in-house organization, but the organization the agency would establish if it were competing for the work. In other words, the existing organization is allowed to make itself more efficient in order to compete. The A-76 Supplemental Handbook provides that "[a]gencies may consider existing management reinvention, consolidation, re-engineering, personnel classification, market and other analyses in the identification and development of the MEO." Office of Management and Budget, Circular No. A-76,

the same work. In this action brought pursuant to 28 U.S.C. § 1491(b)(1) (1994 & Supp. IV 1998), plaintiffs, two federal employees and their unions,[2] challenge the DLA's final cost comparison which led the DLA to contract out the work.

Plaintiffs contend that the DLA's cost comparison contains mistakes in violation of the relevant sections of Office of Management and Budget Circular No. A-76 (Revised 1999) [hereinafter OMB Circular A-76] and its Supplemental Handbook, as well as the Federal Activities Inventory Reform Act of 1998, Pub.L. No. 105-270, § 2(e), 112 Stat. 2382, 2383 (codified at 31 U.S.C. § 501 note (Supp. IV 1998)) ("FAIR") and the Defense Authorization Act, 10 U.S.C. § 2462(b) (1994).[3] The government argues that plaintiffs do not have standing under the cited statutes to challenge the cost comparison, and therefore, this action should be dismissed. Based on the arguments presented by the parties and discussed below, this court concludes that plaintiffs lack standing and thus, this court dismisses the action.

Revised Supplemental Handbook, part I, ch. 3, § E (1996) [hereinafter Supplemental Handbook].

[2] The individual plaintiffs, William J. Gately, a WG-8 blocker bracer, and Michelle Jo Evans, a GS-09 distribution facilities specialist, are currently employed at the Barstow Depot. They claim in their accompanying affidavits that they would likely be included in the MEO if the work is retained in house, but are likely to lose their jobs or benefits if EG & G Logistics, Inc. ("EG & G") is allowed to proceed with its contract. The unions, American Federation of Government Employees ("AFGE") and AFGE Local 1482, allege that they represent the named plaintiffs and other similarly situated Barstow Depot workers who would also likely be included in the MEO, but will lose either their job or benefits if EG & G is allowed to proceed.

[3] Plaintiffs focus their objections on the portions of these statutes and OMB Circular A-76 that govern cost comparisons used to determine whether to contract out an activity, following a public-private competition.

FACTS

A. The DLA Decision

The facts are set forth in the Administrative Record filed with this court on March 22, 2000, and may be summarized as follows. On April 30, 1999, the DLA issued Solicitation No. SPO-770-99-R-7002 ("solicitation") seeking proposals for the performance of defense material distribution services at the Defense Distribution Depot Barstow, California ("Barstow Depot") under a hybrid fixed-price (indefinite delivery time/indefinite quantity) contract for a three-year term, with an option for an additional two years. The performance requirements for the contract were set forth in a Performance Work Statement ("PWS") accompanying the solicitation.

The DLA issued the solicitation in support of a cost comparison study conducted under OMB Circular A-76. OMB Circular A-76 states that it is the general policy of the federal government to rely upon commercial sources to provide the products and services the government needs. *See* OMB Circular A-76 §§ 4-5. OMB Circular A-76 also provides that in-house performance of a commercial activity is authorized if a "cost comparison" demonstrates that the federal agency is operating or can operate the activity at a lower estimated cost than a qualified commercial source. *See id.*

The DLA designed the subject cost comparison study to determine whether the services at the Barstow Depot as described in the PWS could be performed more economically by the DLA's MEO or by a private commercial source. The DLA conducted the cost comparison in two stages, as outlined in part II of the Supplemental Handbook and in the solicitation. First, the DLA conducted a competition among commercial sources to find the lowest-priced, technically-acceptable proposal. Second, the DLA evaluated the selected commercial source's proposal against the MEO's proposal.

In accordance with this process, the DLA received seven proposals from interested private commercial sources. The DLA established the competitive range and held discussions with the various private offerors within the range, including EG & G Logistics, Inc. ("EG & G"), the final contract awardee in this case. EG & G had initially submitted a proposal to perform the work for a fixed price of $14.6 million dollars, which it then reduced to $11.9 million dollars in response to amendment 0011 to the solicitation, which was issued following discussions between the DLA and offerors in the competitive range.[4]

On November 29, 1999, the DLA selected EG & G as the best value offeror for comparison with the MEO. On that same date, the DLA opened the MEO's sealed cost estimate of $17 million, which was based on a workforce of 65 employees.[5] Before conducting the final cost comparison, which requires entry of both the private and the MEO cost proposals on a specified form, the DLA sought to confirm that both proposals were based on the same scope of work and levels of performance. Following that evaluation, the DLA issued solicitation amendment 0013 to allow EG & G to revise its bid to reflect the same workload estimate used by the MEO. On December 17, 1999, EG & G submitted its final proposed price of $11,852,150, based on a workforce of 62 employees.

While the cost comparison process was pending, Congress enacted the FAIR Act, which now governs the process for contracting out to private sources services the government currently provides for itself. Under FAIR, agencies are required to identify those activities that are "not inherently

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[4] Plaintiffs allege that EG & G never provided any justification for this lower bid.

[5] The MEO's proposed workforce of 65 employees represented a 59% reduction from current employee levels at the Barstow Depot.

governmental" and thus, appropriate for contracting out to private sources. *See* FAIR § 2, 83 Stat. at 2382-83. The agency is then required to list those activities that are not inherently governmental with the OMB. *Id.* The statute further provides that when determining whether to contract with a private source for an activity on the list on the basis of a cost comparison with an MEO, "the head of the executive agency shall ensure that all costs . . . are considered and that the costs considered are realistic and fair." *Id.* § 2(e), 83 Stat. at 2383.[6] The distribution services for the Barstow Depot at issue in this case were put on the FAIR list on December 30, 1999.

On January 5, 2000, in accordance with OMB Circular A-76, FAIR § 2(e), and 10 U.S.C. § 2462(b), the DLA conducted a formal cost comparison. First, the DLA entered the MEO's cost estimate of $17,032,459. Then, the DLA entered EG & G's unadjusted cost estimate of $11,852,150. When the cost comparison was completed, taking into account a minimum conversion differential of $1,263,433,[7]

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[6] The cost comparison language contained in section 2(e) of the FAIR Act, which is quoted above, is virtually identical to the language of the cost comparison provision in subsection (b) of 10 U.S.C. § 2462, governing Department of Defense procurement decisions. Section 2462(b) provides that when determining whether to contract with a private source the performance of a Department of Defense function on the basis of a cost comparison with an MEO, "the [head of the agency] shall ensure that all costs considered . . . are realistic and fair." 10 U.S.C. § 2462(b). The plaintiffs here challenge DLA's compliance with the cost comparison study "realistic and fair" requirements, under both FAIR and 10 U.S.C. § 2462(b), as well as OMB Circular A-76.

[7] The minimum conversion differential was calculated as ten percent of personnel costs and is established to ensure that the government will not contract out services for marginal savings. *See* Supplemental Handbook, part II, ch. 4, § A.1. Accordingly, a cost difference must be more than the minimum cost differential for an agency to replace in-house performance with a private contract.

the total in-house cost of performance of $17,032,459 was found to be approximately $2.5 million more than the adjusted cost of EG & G's performance of $14,521,719. Based upon these results, the DLA made a tentative determination to contract out the Barstow Depot operations to EG & G.

Pursuant to OMB Circular A-76 and 48 C.F.R. § 52.207-2(c)(1), the award remained tentative until the completion of a public review period and resolution of any administrative appeals. OMB Circular A-76 allows for administrative appeals by various parties, including potentially displaced federal workers and their unions. *See* Supplemental Handbook, part I, ch. 3, § K. OMB Circular A-76 further provides that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular," except for administrative appeals under the Supplement or as provided by FAIR. OMB Circular A-76 § 7 and Supplemental Handbook, part I, ch. 3, § K.7.

AFGE, Barstow Depot employees, and EG & G each submitted an administrative appeal to the DLA Appeal Authority ("Appeal Authority"). The Appeal Authority sustained a number of appeal issues asserted by plaintiffs and calculated the total effect of these issues on the cost comparison. This calculation resulted in a maximum potential decrease of $1,469,421 in the MEO's proposed price and maximum potential increase of $62,284 in EG & G's price. The Appeal Authority determined that, even after these potential adjustments, the price differential between the MEO's price and EG & G's price was $2,242,468, or $979,035 above the minimum conversion differential. The Appeal Authority ultimately upheld the DLA's cost comparison, stating that "I did not identify any significant problems with the challenged cost items, either individually

or in the aggregate, such that the tentative decision might be considered unsupported or in error." [8]

B. This Action

On March 16, 2000, following the Appeal Authority's March 9, 2000 decision, plaintiffs filed this bid protest action challenging the DLA's final decision to award the contract to EG & G. Accompanying their complaint, plaintiffs also filed an application for a temporary restraining order and a motion for a preliminary injunction, seeking to enjoin performance of the contract. Based upon the government's representations to this court that the agency would temporarily postpone performance, by order dated March 17, 2000, this court denied plaintiffs' application for a temporary restraining order and consolidated the motion for preliminary injunction with resolution of the case on the merits.

In this action, plaintiffs challenge the final DLA cost comparison on the grounds that the DLA failed to conduct a proper cost comparison in violation of OMB Circular A-76, 10 U.S.C. § 2462(b), and section 2(e) of the FAIR Act. In particular, plaintiffs allege that the DLA violated the above-noted statutes and regulation by failing to confirm EG & G's costs through a cost realism analysis.[9] Plaintiffs contend that

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[8] The Appeal Authority did not address the appeal issues raised by EG & G because it sustained the decision of the agency after evaluating the appeals of plaintiff AFGE and the Barstow Depot management employees. At that point, the EG & G appeal became moot, as it could not change the outcome.

[9] In support of their claim, plaintiffs cite 48 C.F.R. § 15.404-1(d), which provides that a cost realism analysis is required to be performed on cost-reimbursement contracts to determine the probable cost of performance for each offeror. Pursuant to 48 C.F.R. § 15.404-1(d)(3), cost realism analysis *may* also be used to evaluate fixed-price contracts, such as the one at issue in this case, but is *not* required for such contracts. *Id.* (emphasis added). In addition, plaintiffs contend that a cost realism analysis was required by the solicitation. The solicitation lists "cost/

nothing in the record explains EG & G's $11.8 million price, which is undisputably 46% lower than the next lowest private contractor proposal to perform the work. Plaintiffs contend that EG & G seriously underbid the work. In addition, plaintiffs argue that EG & G's final bid understates or omits numerous other costs that were included in the MEO price. Most importantly, plaintiffs argue that EG & G violated the Services Contract Act ("SCA"), 41 U.S.C. §§ 351-354 (1994), and its implementing regulations, 48 C.F.R. § 52.222-41, by using improper labor classifications. Plaintiffs contend that this resulted in over $900,000 in illegal savings.[10] Plaintiffs also argue that EG & G failed to include costs for computer support for data processing, overtime pay for mobile crane/rigging operations, various transition and refurbishing costs, and time for sick leave and training.

The government argues that this court must dismiss this action because, regardless of whether the cost comparison was proper, these plaintiffs lack the requisite standing to challenge the cost comparison. The government contends that every court to examine similar challenges by similarly situated plaintiffs, regarding compliance with OMB Circular A-76 and identical cost comparison statutes, has concluded that displaced federal employees and their unions do not have standing to challenge cost comparisons. The government further argues that, should this court conclude that these

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price" as the most important evaluation factor for an award under the solicitation. *See* solicitation at 226-27. The solicitation further identifies "realism" and "completeness" of the proposed costs in relation to the required work under the contract among the bases for evaluating the "cost/price" factor. *Id.* at 227.

[10] Plaintiffs note that although the AFGE did not raise the labor classifications issue before the Appeal Authority, it is properly before this court because it was raised before the Appeal Authority by the Barstow Depot employees, and may be properly raised for the first time in court, regardless of whether it was raised below.

plaintiffs have standing, the government is entitled to judgment on the administrative record. According to the government, where as here, EG & G was awarded a fixed-price contract, the government was not required to perform a cost realism analysis because EG & G is obligated to perform at the contract price whether or not its costs are realistic. In addition, the government contends that EG & G factored in all necessary costs in its final bid. The court heard oral argument on May 1, 2000.

DISCUSSION

The threshold issue in this case is whether these plaintiffs may maintain this action challenging the government's compliance with the cost comparison requirements of 10 U.S.C. § 2462(b) and section 2(e) of the FAIR Act, which is now implemented under OMB Circular A-76. The government contends that these plaintiffs lack standing to challenge the alleged statutory violations of FAIR and 10 U.S.C. § 2462(b) because they are not "interested parties" within the meaning of the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub.L. No. 104-320, § 12, 110 Stat. 3870, 3874 (codified at 28 U.S.C. § 1491(b)(1)), which gives the Court of Federal Claims ("COFC") jurisdiction over bid protest cases. The Tucker Act provides in relevant part as follows:

> *Both the Unite[d] States Court of Federal Claims and the district courts of the United States* shall have jurisdiction to render judgment on an action by an *interested party objecting to* a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or *any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.* Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction

> to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1) (emphasis added).

A. "Interested Party" Under the ADRA

Although the ADRA allows only "interested parties" to maintain a suit to challenge a procurement decision, the ADRA does not define "interested party." The government contends that in such circumstances this court should look to the definition of "interested party" Congress provided in the Competition in Contracting Act ("CICA"), Pub.L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10, 31, and 41 U.S.C.), which governs administrative bid protest jurisdiction before the General Accounting Office ("GAO"). CICA defines "interested party" to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2) (Supp. IV 1998).

The government contends that engrafting CICA's definition of "interested party" onto the ADRA assures that only those "actual or prospective bidders" with a direct financial interest in the procurement have standing to sue. The government goes on to note that the GAO, in applying the CICA definition, has expressly held that unions representing potentially displaced federal workers, like AFGE here, do not have standing to challenge a procurement to contract out services that were previously performed by government employees because they are not "actual or prospective bidders." *See American Fed'n of Gov't Employees,* B-219590, 219590.3, 86-1 CPD § 436, 1986 WL 63479 (Comp.Gen. May 6, 1986); *National Fed'n of Fed. Employees Local 2049,* B-220838, 85-2 CPD § 454, 1985 WL 53480 (Comp.Gen. Oct.23, 1985); *see also* GAO letter to Sen. James Sasser, 1986 WL 63592 (Comp.Gen. Sept.2, 1986). The

government maintains that because these plaintiffs do not have standing under CICA, they should not be given standing under the ADRA.[11]

Plaintiffs argue in response that this court should not limit the definition of "interested party" in the ADRA to the CICA definition. They argue that the term "interested party" should be given its broadest possible meaning and should include anyone who has a direct economic interest in the procurement award, regardless of whether or not they could bid. Plaintiffs suggest that the ADRA allows for review of procurement decisions by any person who participated in the procurement process. Plaintiffs argue that because they have a direct economic interest (in that they may lose their jobs or benefits) and participated in the agency procurement process, they have standing under the ADRA to challenge the cost comparison study underlying the ultimate procurement decision of the DLA.

Whether potentially displaced federal employees and their unions are "interested parties" under the ADRA who may challenge an alleged "violation of statute or regulation in connection with a procurement" is an issue of first impression in this court. Although most members of the Court of Federal Claims have held that the term "interested party" under the ADRA is not limited to those parties covered by CICA, none have had to address the issue squarely. *See, e.g., Phoenix Air*

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[11] In addition, the government argues that the Federal Circuit has looked to the same definition of "interested parties" as appears in CICA in determining the scope of the COFC's jurisdiction under the Tucker Act before it was amended by the ADRA. *See Federal Data Corp. v. United States,* 911 F.2d 699, 703 (Fed.Cir.1990) (citing a definition for "interested party" in the since-repealed statute governing bid protest actions in front of the General Services Board of Contract Appeals that is identical to the CICA definition of "actual or prospective bidder"). There is no question but that the COFC has looked to the jurisdictional statutes for the GAO and Contract Boards in defining its own jurisdiction both before and after the ADRA was enacted.

Group, Inc. v. United States, 46 Fed.Cl. 90, 101-02 (2000); *Winstar Communications, Inc. v. United States,* 41 Fed.Cl. 748, 756 (1998); *CCL, Inc. v. United States,* 39 Fed.Cl. 780, 789-90 (1997); *Delbert Wheeler Constr., Inc. v. United States,* 39 Fed.Cl. 239, 245 & n. 11 (1997), *aff'd,* 155 F.3d 566 (Fed.Cir.1998) (table); *ATA Defense Indus., Inc. v. United States,* 38 Fed.Cl. 489, 494 (1997). In each of the above-cited cases, the Court ultimately determined that the plaintiffs were actual or prospective bidders who could satisfy CICA's "interested party" test.[12] That is not the case here. No one argues that these plaintiffs are actual or prospective bidders. As such, this court must decide whether these plaintiffs have standing as "interested parties" under the ADRA to challenge the statutes and regulations they claim were violated in connection with this procurement. To decide this issue, this court must look to the language of the ADRA, its purpose, and its legislative history, to determine whom Congress intended to be an "interested party."

Prior to the enactment of the ADRA, jurisdiction over bid protests was divided between the COFC, which heard pre-award bid protest actions under the Tucker Act, 28 U.S.C. § 1491(a), and the federal district courts, which heard post-award bid protest actions under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704 (1994). Congress enacted the ADRA in 1996 to expand the jurisdiction of both the COFC and the federal district courts to allow both courts to hear "the full range of cases previously subject to review in either system." *See* 142 Cong. Rec. S11848-01, S11849-50 (daily ed. Sept. 30, 1996) (statement of Sen. Levin). To understand fully whom Congress intended to have standing under this

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[12] Some members of the COFC have held that ourjurisdiction is the same as the GAO's under CICA. *See, e.g., Ryan Co. v. United States,* 43 Fed.Cl. 646, 657 n. 17 (1999); *Cincom Systems, Inc. v. United States,* 37 Fed.Cl. 663, 669-70 (1997). For the reasons stated above, this court respectfully disagrees.

new jurisdictional grant, this court must examine who had standing in either court under each forum's pre-ADRA jurisdiction over bid protest cases.

Before Congress enacted the ADRA, the federal district courts heard post-award bid protest challenges to procurement decisions under the waiver of sovereign immunity provided for under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. *See Scanwell Labs., Inc. v. Shaffer,* 424 F.2d 859 (D.C.Cir.1970). A party has standing to bring an action under the APA if that party is "a person ... adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The court in *Scanwell* interpreted this provision to mean that "one who makes a prima facie showing alleging [that the agency decision was arbitrary or capricious] has standing to sue [as an aggrieved person] under section 10 of the Administrative Procedure Act." *See Scanwell,* 424 F.2d at 869.

Accordingly, under *Scanwell,* the federal district courts exercised jurisdiction under the APA over bid protest cases brought by a party challenging a government procurement decision based on an alleged violation of a procurement-related statute. Under this authority, federal district courts exercised jurisdiction over a broad range of plaintiffs who claimed standing under the APA. *See Diebold v. United States,* 947 F.2d 787, 810-11 (6th Cir.1991) (holding that the government's decision to privatize an activity was subject to review under the APA, but remanding the case to determine whether displaced federal employees and their union had standing to maintain the suit); *see, e.g., Contractors Eng's Int'l, Inc. v. U.S. Department of Veterans Affairs,* 947 F.2d 1298, 1300 (5th Cir.1991) (holding that whether subcontractor has standing to challenge agency action depends on whether plaintiff has standing under traditional APA standing requirements).

The COFC and its predecessors also exercised jurisdiction over bid protest cases. The COFC heard challenges brought by disappointed bidders based on the implied-in-fact contract found to exist between the government and bidders on federal procurements, under which the government has a duty to fairly and honestly evaluate bids. *See Southfork Sys., Inc. v. United States,* 141 F.3d 1124, 1132 & n. 5 (Fed.Cir.1998) (decided under "the law as it stood prior to the 1996 amendments"); *United States v. John C. Grimberg Co.,* 702 F.2d 1362, 1367 (Fed.Cir.1983) (*en banc*); *Heyer Prods. Co. v. United States,* 140 F.Supp. 409, 413, 135 Ct.Cl. 63, 70-71 (1956). This jurisdiction was based on the Tucker Act, which authorizes the COFC to "render judgment upon any claim against the United States founded upon . . . any express or implied contract." 28 U.S.C. § 1491(a)(1) (1994). Disappointed bidders were the only parties who had standing to bring a bid protest in this context, because they were the only parties who could be construed to have this implied contractual relationship with the government. *See Motorola, Inc. v. United States,* 988 F.2d 113, 114 (Fed.Cir.1993); *Control Data Sys., Inc. v. United States,* 32 Fed.Cl. 520, 524 (1994).

When Congress enacted the Federal Courts Improvement Act of 1982 ("FCIA"), Pub.L. No. 97-164, 96 Stat. 25, it amended the Tucker Act to include exclusive jurisdiction in the COFC to enter declaratory or injunctive relief in *pre-award* challenges to procurement decisions. *See* 28 U.S.C. § 1491(a)(3) (repealed by the ADRA § 12, 110 Stat. at 3874); *John C. Grimberg,* 702 F.2d at 1367. Section 1491(a)(3) provided that:

> [t]o award complete relief on any contract claim *brought before the contract is awarded,* the court shall have *exclusive* jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.

28 U.S.C. § 1491(a)(3) (repealed by the ADRA § 12, 110 Stat. at 3874) (emphasis added).

This jurisdictional divide between the federal district courts which heard post-award bid protest challenges and the COFC which heard pre-award bid protest challenges was not lost on Congress. To the contrary, Congress expressly indicated in the House and Senate reports giving this court pre-award bid protest jurisdiction under the FCIA, that federal district courts would continue to have jurisdiction to hear complaints challenging post-award decisions under the APA. *See* S. REP. NO. 97-275, at 22-23, *reprinted in,* 1982 U.S.C.A.A.N. 11, 32-33 ("[T]he committee does not intend to alter the current state of the substantive law in this area. Specifically, the Scanwell doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left intact. *See Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C.Cir.1970)."); H.R. REP. NO. 97-312, at 43 (1981) ("It is not the intent of the Committee to change existing caselaw as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action. *See, e.g. Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C.Cir.1970)."). Rather, under the FCIA, Congress specifically expressed an intent to continue divided bid protest jurisdiction in this court and the federal district courts, stating that "[t]he dual questions of whether these powers should even be broader and of whether they should be exclusive of the district courts will have to wait for a later date." H.R. REP. NO. 97-312, at 43.

After 10 years, some in Congress came to believe that this divided jurisdictional approach was inefficient because it resulted in a lack of uniformity of law and "unnecessary and wasteful litigation over jurisdictional issues." *See* 142 Cong. Rec. at S11848-49 (statements of Sens. Cohen and Levin). Eventually, in 1993, the congressionally-sponsored Acquisition Law Advisory Panel (the so-called "section 800 Panel"

of the National Defense Authorization Act for Fiscal Year 1991, Pub.L. No. 101-510, § 800, 104 Stat 1485, 1586 (1990)),[13] recommended to Congress that it should end this jurisdictional division and consolidate all challenges regarding procurement award decisions in the COFC. *See* 142 Cong. Rec. at S11849 (statement of Sen. Levin).

Congress did not adopt the full recommendation of the Advisory Law Panel. Instead, Congress enacted the current version of the ADRA, which amended the COFC's Tucker Act jurisdiction to give both the COFC and the federal district courts coequal jurisdiction over pre- and post-award procurement decisions. The legislation further provides that after four years, unless specifically extended by Congress, federal district court jurisdiction over award decisions will expire.[14] Senator Carl Levin, the legislation's sponsor, explained the purpose of the changes when he introduced the ADRA:

> The revised bill we are taking up today contains a compromise provision that would consolidate the jurisdiction of the Court of Federal Claims and the district courts. For 4 years, the consolidated jurisdiction would be shared by the Court of Federal Claims and the district courts. *Each court system would exercise jurisdiction over the full range of bid protest cases*

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[13] Section 800 authorized the Under Secretary of Defense for Acquisition to establish an advisory panel to review all laws affecting the DOD acquisition process in order to streamline the procurement process. *See* § 800, 104 Stat. at 1586.

[14] Section 12(d) of Pub.L. No. 104-270 provided the following sunset provision:

> [t]he jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of titled 28, United States Code . . . shall terminate on January 1, 2001 unless extended by Congress.

28 U.S.C. § 1491 note (Supp. IV 1998).

> *previously subject to review in either system.* After 4 years, the jurisdiction of the district courts would terminate, and the Court of Federal Claims would exercise exclusive judicial jurisdiction over procurement protests.

Id. at S11849-50 (emphasis added).

Thus, in enacting the ADRA, Congress intended to give the COFC "the full range of bid protest cases previously subject to review in either system." *Id.* Accordingly, the jurisdiction of the COFC now includes jurisdiction to hear the bid protest cases that were previously heard exclusively in the federal district courts, in addition to the same bid protest jurisdiction it exercised prior to the ADRA.[15]

Because the federal district courts' jurisdiction was not limited by an implied-in-fact contract theory to actions filed by "actual or prospective bidders," the COFC's jurisdiction today should not be limited to claims by such persons. Rather, Congress clarified that the COFC, like the federal district courts, would be able to hear claims based on "*any alleged violation of statute or regulation in connection with a procurement or proposed procurement.*" 28 U.S.C. § 1491(b)(1) (emphasis added). In this last phrase, Congress created a parallel to the claims previously heard exclusively by federal district courts under the APA, *i.e.*, those claims brought by a "person ... adversely affected or aggrieved by agency action within the meaning of a relevant statute."[16]

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[15] Likewise, under this court's reading of the ADRA, until the sunset provision takes effect in January 2001, federal district court jurisdiction over bid protest cases now includes bid protest cases that were previously subject to review exclusively in the COFC, in addition to bid protest cases that were heard under the APA.

[16] The fact that Congress enacted a sunset provision as part of the ADRA that terminates the federal district courts' authority to hear bid protest actions in 2001 bolsters this interpretation. It would not make sense for Congress to eliminate federal district court as a bid protest

5 U.S.C. § 702. In construing the ADRA, this court would fail to give effect to the language of the statute, as well as Congress' clearly stated intent to grant coequal forums, if it excluded parties who previously would have had standing to bring a bid protest action in the federal district courts under the APA from the scope of "interested party" under the ADRA.

In view of the foregoing, this court concludes that the ADRA does not limit standing to parties who meet the definition of "interested party" under CICA. Rather, in accordance with the words of the ADRA and its legislative history, this court concludes that the COFC may also hear challenges to procurement award decisions brought by persons who would have had standing in federal district court under the APA to challenge that same procurement decision.[17]

B. APA Standing Requirements

The requirements for establishing standing under the APA are well settled. Claimants challenging an agency decision under the APA must demonstrate that: (1) they have suffered sufficient "injury-in-fact;" (2) that the injury is "fairly traceable" to the agency's decision and is "likely to be

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forum if it did not believe that the COFC would be available to hear those cases.

[17] In looking to the APA to define "interested party" standing, the court notes that there are other terms in the statute, including the term "Federal agency," which require definition and which may or may not be limited by the APA. The purpose of the ADRA is to grant both the COFC and federal district courts "the *full range* of jurisdiction previously exercised in *either system*." 142 Cong. Rec. at S11849-50. Therefore, if the COFC had jurisdiction, prior to the enactment of the ADRA, over "Federal agency" procurement decisions that were beyond the reach of federal district courts under the APA, the ADRA does not diminish that jurisdiction. *See Hewlett-Packard Co. v. United States*, 41 Fed.Cl. 99, 104 (1998).

redressed by afavorable decision;" and (3) that the interests sought to be protected are "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (citations omitted) (alteration in original); *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citations omitted).

With respect to the first inquiry, plaintiffs allege that they satisfy the injury-in-fact test because they stand to lose their jobs and job benefits if the private contract award is implemented. Second, plaintiffs contend that if the procurement is set aside, as federal employees likely to be in the MEO, their injury would be redressed. Plaintiffs further contend that they satisfy the zone-of-interests test because they are within the zone of interests to be protected by the cost comparison statutes they allege were violated, namely section 2(e) of FAIR and 10 U.S.C. § 2462(b).[18]

The government contends, in response, that plaintiffs do not satisfy the injury-in-fact test because their alleged injuries are too speculative to establish standing. The government argues that until the private contract is implemented and the individual plaintiffs actually lose their jobs or benefits, they cannot show that they, in fact, have been harmed.[19] The

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[18] In addition, while plaintiffs claim they also are within the zone of persons covered by OMB Circular A-76, they do not claim that A-76 provides them with judicial standing. Because OMB Circular A-76 is an executive order and not a statute or regulation, it does not by itself confer any rights to judicial review. *See National Fed'n of Fed. Employees ("NFFE") v. Cheney*, 883 F.2d 1038, 1043 (D.C.Cir.1989).

[19] Because the union-plaintiffs' standing is derivative of their members' standing, unless the individual plaintiffs can establish standing, the unions' standing will also fail. *See American Fed'n of Gov't Employees ("AFGE") v. Clinton*, 180 F.3d 727, 733 (6th Cir.1999); *American Fed'n of Gov't Employees ("AFGE") v. Cohen*, 171 F.3d 460, 465 (7th Cir.1999).

government notes that under the rules governing the contracting-out process, displaced federal workers have various rights, including the right of first refusal to work for the new contractor. *See* 48 C.F.R. § 52.207-3. Thus, the government argues, until the process is played out, it is not clear who, if anyone, will be harmed by the contracting-out decision.

Further, the government argues that plaintiffs' harm in this case is not traceable to the alleged cost comparison violations, but stems from the initial decision to privatize the work, which plaintiffs do not challenge. In that connection, the government argues that, even if the plaintiffs were to win their challenge and the MEO were to do the work, more than half of the present federal workers would be out of jobs. The government contends that in such circumstances, the harm plaintiffs argue here is similar to the harm alleged by displaced federal workers in *American Fed'n of Gov't Employees ("AFGE") v. Clinton,* 180 F.3d 727, 731 (6th Cir.1999), in which the Sixth Circuit held that individual federal employees could not show that their harm was traceable to violations in the contracting-out process. In that case, the Sixth Circuit found that the displaced workers' harm stemmed from the threshold decision to privatize the work in the first instance.[20] *See id.* at 732 (holding that plaintiffs' loss

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[20] This court notes that this traditional standing inquiry into whether plaintiffs' harm is fairly traceable to the agency decision is also required by the ADRA, which provides that a person must show that the alleged statutory violation arises "in connection with [the challenged] procurement." 28 U.S.C. § 1491(b)(1). Thus, while the court recognizes that the ADRA provides "sweeping" jurisdiction, *see Ramcor Servs. Group v. United States,* 185 F.3d 1286, 1289 (Fed.Cir.1999), the ADRA still requires that a party demonstrate standing, whether in federal district court or the COFC. *See Massachusetts Bay Trasp. Auth. v. United States,* 21 Cl.Ct. 252, 257-58 (1990), *rev'd on other grounds,* 129 F.3d 1226 (Fed.Cir.1997) ("Although established under Article I, the [COFC] traditionally has applied the case or controversy requirement unless

"results most clearly from the unchallengeable and unchallenged decision to close bases").

Finally, the government contends that, even if these plaintiffs can show injury-in-fact that is fairly traceable to the agency decision, they are not within the zone of interests to be protected under the statutes that they allege were violated. As discussed in greater detail below, the government contends that displaced federal workers and their unions may not challenge cost comparisons undertaken to provide the "best value to the American taxpayer." *See infra* pp. 597-98. The government argues that every court to hear a similar challenge by displaced workers challenging cost comparisons under 10 U.S.C. § 2462(b), which contains the identical cost comparison language now in FAIR, has determined that displaced federal workers and their unions do not have standing to challenge the cost comparison process. *See, e.g., American Fed'n of Gov't Employees ("AFGE") v. Cohen,* 171 F.3d 460, 470-71 (7th Cir.1999); *National Fed'n of Fed. Employees ("NFFE") v. Cheney,* 883 F.2d 1038, 1050 (D.C.Cir.1989). The government contends that these plaintiffs have not presented any basis for departing from these precedents.

C. Plaintiffs Are not Within the Zone of Interests of "FAIR" or 10 U.S.C. § 2462

Because this court agrees with the government that these plaintiffs are not within the zone of interests to be protected

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jurisdiction conferred by Congress demands otherwise."); and cases cited therein.

In this instance, this court finds that plaintiffs satisfy this ADRA-standing requirement because whether the cost comparison performed by the DLA was improper, as plaintiffs allege, goes to the very heart of the procurement decision and thus, their injury is "fairly traceable" to the agency decision and would be redressed by setting the procurement decision aside.

by the statutes that they allege were violated, it need not reach the injury-in-fact question.[21] Although this court concludes that plaintiffs' alleged injuries are fairly traceable to the procurement decision, *i.e.,* injuries based on statutory violations "in connection with [the challenged] procurement," they cannot show that they are within the zone of interests protected by the provisions of the statutes that they claim were violated. Accordingly, they cannot establish that they are "interested parties" under the ADRA.

During their argument before this court, plaintiffs focused their standing argument on the alleged violation of section 2(e) of FAIR, which they claim distinguishes this case from earlier cases that were decided under 10 U.S.C. § 2462(b). Thus, this court will focus its analysis on FAIR as well. As discussed above, Congress enacted FAIR in 1998 to encourage the federal government to contract out to private sources those governmental services that are "not inherently governmental in nature." As its principal sponsor, Senator Craig Thomas stated in introducing the final bill in the Senate that Congress intended FAIR to "codif[y] a process to assure government reliance on the private sector to the maximum extent feasible." 144 Cong. Rec. S9104-02, S9105 (daily ed. July 28, 1998) (statement of Sen. Thomas). To this end,

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[21] If this court were to reach the issue, however, it would conclude that these plaintiffs satisfy the injury-in-fact test. There is no question but that some union members will lose the opportunity to retain their jobs as members of the MEO because of the cost comparison results. Their job loss is reasonably traced to the alleged errors in the cost comparison and would be redressed if they were to prevail. Thus, this case is distinguishable from *AFGE v. Clinton* and more like *National Air Traffic Controllers Assoc. v. Pena,* 944 F.Supp. 1337, 1345-46 (N.D.Ohio 1996), where on remand from the Sixth Circuit, the court found that air traffic controllers employed by the Federal Aviation Administration ("FAA") and their union had standing to challenge the FAA's plan to privatize air traffic control responsibilities at federal facilities. Indeed, the government has not offered any factual evidence to contest this conclusion.

FAIR establishes a process that directs federal agencies to review their activities annually and to establish a list of those activities that are "not inherently governmental," and therefore appropriate for contracting out to private sources. *See* FAIR § 2(a), 112 Stat. at 2382.

Section 3(b) of FAIR identifies certain persons, including federal employees and their unions, as "interested parties" who "may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list . . . under section 2[(a) of this Act]." *Id.* § 3(a)-(b), 112 Stat. at 2383. Once an activity is on the list, the agency must make the activity available for competition. *See id.* § 2(d), 112 Stat. at 2383. Thereafter, if the agency is required to conduct a cost comparison between the private source and in-house performance of the work, FAIR requires that "all costs . . . are considered and that the costs considered are realistic and fair," *see id.* § 2(e), 112 Stat. at 2383, in order to ensure "best value to the American taxpayer," 144 Cong. Rec. at S9104 (statement of Sen. Thomas).

Congress enacted the final FAIR legislation after much debate and compromise. Indeed, the predecessor FAIR bills, entitled the "Freedom from Government Competition Act," contained very different language from the language ultimately enacted. *See* 144 Cong. Rec. at S9104-05 ("[T] measure reported . . . is significantly different than S. 314 as introduced."). The original bills, H.R. 716 and S. 314, mandated federal agencies to "procure from sources in the private sector all goods and services that are necessary for or beneficial to the accomplishment of authorized functions of the agency," except under four limited exceptions. H.R. 716, 105th Cong. § 3(a) (1997); S. 314, 105th Cong. § 3(a) (1997). Based on "many months of discussions among both the majority and minority on the committee, OMB, Federal employee unions [including AFGE], and private sector

organizations," Congress substantially modified the FAIR legislation that was eventually enacted to reflect "a consensus and compromise." *See* 144 Cong. Rec. at S9104 (statement of Sen. Thomas). The final legislation establishes a procedure for identifying and listing activities that should be made available for contracting out. In addition, the final bill allows for public-private competitions. Senator Thomas identified this later compromise as a significant revision. *See id.* (stating, "I revised my bill when introducing it last year to include such competitions").

Plaintiffs argue that because they are included in the definition of an "interested party" for the purpose of challenging the lists developed under section 2(a) of FAIR, and because FAIR preserved the notion of public- private competitions, their interests are within the zone of interests to be protected under the entire statute.

Although the plaintiffs' arguments have some surface appeal, upon closer scrutiny, it is clear that plaintiffs' interests with respect to cost comparisons are not within the zone of interests protected under FAIR. In the plain language of FAIR, Congress specifically distinguishes between the agency's decision to place a particular activity on the list to be contracted out, *see* FAIR § 2(a), 112 Stat. at 2382, and the agency's decision to contract out to a particular source, *see id.* § 2(d)-(e), 112 Stat. at 2383. Section 3(a) of FAIR is cognizant of this distinction and expressly limits authorized challenges to "*an omission of a particular activity, or the inclusion of a particular activity on . . . a list under section 2.*"[22] *Id.* § 3(a), 112 Stat. at 2383 (emphasis added).

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[22] The district court recognized standing to challenge the initial decision to contract out an activity in *National Air Traffic Controllers Assoc.*, 944 F.Supp. at 1345, in which the court held that plaintiffs had standing to challenge the agency's initial decision to privatize certain functions allegedly in violation certain prohibitions of federal procurement statutes and OMB Circular A-76.

More specifically with regard to standing, section 3(b), which defines who is an "interested party," expressly limits challenges to those "with respect to an activity referred to in subsection [2](a)." *Id.* § 3(b), 112 Stat. at 2383.

If Congress intended to provide "interested party" standing to challenge cost comparisons pursuant to a public-private competition under section 2(e), Congress would not have expressly limited such standing to challenges to the list. *Id.* § 2(e), 112 Stat. 2383. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 22, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir.1972)); *LeFevre v. Secretary, Dep't of Veterans Affairs,* 66 F.3d 1191, 1200 (Fed.Cir.1995) (citing *Russello,* 464 U.S. at 22, 104 S.Ct. 296). Accordingly, under the plain language, Congress did not intend for federal employees and their unions to be able to challenge cost comparisons.[23]

Moreover, no evidence exists in the legislative history of the FAIR Act that would dictate a contrary result. Congress recognized that even when an activity is listed as appropriate to be contracted out, federal employees might be able to

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[23] This court recognizes that employees and their unions are included under OMB Circular A-76 as "interested parties," who can administratively challenge the cost comparison decision administratively and that Congress was fully aware of the rights provided for under OMB Circular A-76 when enacting FAIR. *See* 144 Cong. Rec. at S9104 (statement of Sen. Thomas). This is all the more reason why this court finds that Congress' failure to include the cost comparison provision, section 2(e), within the ambit of section 3 challenges was not a mere oversight. Congress was aware of the well-settled rule that Executive Orders do not by themselves establish rights to judicial review. *See Independent Meat Packers Assoc. v. Butz,* 526 F.2d 228, 236 (8th Cir. 1975).

perform that activity more economically than private contractors. Thus, FAIR allows for a public-private competition under section 2(e). *See* FAIR § 2(e), 112 Stat. at 2383. However, according to the legislative history, if the agency conducts a public-private competition, the purpose of that competition is to provide the "best value to the American taxpayer;" the purpose is not to support continued employment by federal workers. *See* 144 Cong. Rec. at S9104, quoted *supra* p. 597.

Plaintiffs argue that in vindicating their interests, *i.e.*, preventing the government from contracting out their jobs in violation of federal procurement statutes, they are furthering Congress' interest in providing the most economical result for taxpayers. In this connection, plaintiffs stress that they are the only parties in a position to enforce compliance with the cost comparison provision where the decision is to contract out the work.

Other displaced federal employees and their unions have asserted these same arguments in the past to support their right to challenge cost comparisons performed under the identical language in 10 U.S.C. § 2462(b). And, as the government correctly notes, the courts have uniformly rejected these arguments. Most recently, the Seventh Circuit in *AFGE v. Cohen*, 171 F.3d at 470-71, held that displaced federal workers and their unions lack standing to challenge the government's compliance with 10 U.S.C. § 2462(b). In applying the zone-of-interest test in connection with 10 U.S.C. § 2462(b), the Seventh Circuit found that federal workers' interests were "indistinguishable from that of any taxpayer, which is insufficient to support standing under the zone-of-interest test." *Id.* at 470-71 (citing *NFFE v. Cheney*, 883 F.2d at 1047). Relying on longstanding Supreme Court precedent, that persons with only a " 'generalized grievance' about the way in which government operates do not have

standing," the Circuit concluded that "without something more, the federal employees in this case do not pass the test." *Id.* at 471.

The Seventh Circuit further explained that displaced federal workers cannot show something more based on their interest in keeping their jobs. As the Seventh Circuit stated, "the interests of federal employment, and the goal of private procurement are inconsistent."[24] *Id.* (citing *NFFE v. Cheney*, 883 F.2d at 1051); *see also National Credit Union*, 522 U.S. at 491, 118 S.Ct. 927 (stating that the zone-of-interests test "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the statute") (citations omitted) (alteration in original).

Plaintiffs in this case stand in no better position than the plaintiffs in *AFGE v. Cohen*. They have not provided this court with any basis upon which to deviate from the precedent followed in that case.[25] Although AFGE was

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[24] The Seventh Circuit, however, eventually did find plaintiffs were within the zone of interests of the Arsenal Act, 10 U.S.C. § 4532 (1994), which "[u]nlike the other statutes cited by the plaintiffs . . . appears to be aimed at preserving the government's in-house military production capabilities." *AFGE v. Cohen*, 171 F.3d at 473.

[25] Moreover, several courts have expressly determined that displaced federal workers and unions do not have standing to challenge a procurement decision to outsource work on the grounds that plaintiffs claim is their chief concern here. Plaintiffs claim that the "largest single error" in the cost comparison is that EG & G won the competition by violating the SCA, 41 U.S.C. §§ 351-354, and its implementing regulations, 48 C.F.R. § 52.222-41, in identifying job classifications. Although plaintiffs do not rely on the SCA as a basis for standing, they argue that labor classifications that violate the act undermine the "fair and realistic" requirement of the cost comparison provision of FAIR, thereby affecting their interest in not being deprived of federal employment as a result of an unlawful procurement process. This same argument has been rejected on standing grounds. In *American Fed'n of Gov't Employees v. Stetson*, 640 F.2d 642, 646 (5th Cir.1981), and *American Fed'n of Gov't Employees v.*

decided under 10 U.S.C. § 2462, the legislative history indicates that, Congress had the same purposes in mind in enacting FAIR that are evident in 10 U.S.C. § 2462(b). Indeed, as noted above, the cost comparison language reviewed in *AFGE v. Cohen* is identical to the language of section 2(e) of the FAIR Act. *See supra* p. 589 n. 6. Where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, as least insofar as it affects the new statute." *Lorillard v. Pons,* 434 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

Although the Seventh Circuit decided *AFGE v. Cohen* after FAIR was enacted, the Circuit based its rationale in that case on a long line of precedent first articulated by the Circuit Court of Appeals for the District of Columbia in *NFFE v. Cheney,* 883 F.2d at 1038. In *NFFE v. Cheney,* the D.C. Circuit determined that federal unions and their members were not within the zone of interests protected by 10 U.S.C. § 2462(b) (then "section 1223(b)"), [26]which contained the same cost comparison requirement. *See id.* [27]

Dunn, 561 F.2d 1310, 1313 (9th Cir.1977), the courts of appeal held that the SCA was only intended to protect the rights of the employees of private contractors hired to perform government services, not displaced federal employees.

[26] Section 1223(b), the cost comparison provision at issue in *NFFE v. Cheney,* was first enacted as Pub.L. No. 99-661, § 1223(b), 100 Stat. 3816, 3977 (originally codified at 10 U.S.C. § 2304 note (Supp. III 1985)), but later repealed and recodified in 10 U.S.C. § 2462(b), when Congress enacted Pub.L. No. 100-370, § 2(a)(1), (c)(3), 102 Stat. 840, 853-54 (1988) in order to codify several defense authorization statutes, which were permanent provisions of law but were enacted as free-standing provisions rather than as amendments to the United States Code or other appropriate existing laws. *See* H.R. REP. NO. 100-696, *reprinted in,* 1988 U.S.C.A.A.N. 1077.

[27] The plaintiffs correctly note that the portion of the *NFFE* decision which states that the zone-of-interests test requires claimants to show that

Significantly, Congress enacted FAIR after the decision in *NFFE v. Cheney* and therefore can be presumed to have had knowledge of the interpretation given the cost comparison language in the provision. Congress had the opportunity to add protections for federal employment at that time, if it intended to do so. In fact, according to the legislative history, federal employee unions, including AFGE, actively participated in formulation of the FAIR Act. *See* 144 Cong. Rec. at S9104, quoted *supra* p. 597.

Examined against this backdrop, this court is persuaded that Congress did not intend to include federal employees and their unions within the zone of interests protected by section 2(e) of FAIR or 10 U.S.C. § 2462(b).[28] As such, these plain-

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they are intended beneficiaries of the statute is no longer good law. The Supreme Court has expressly disavowed that reasoning. *See National Credit Union*, 522 U.S. at 488-89, 118 S.Ct. 927 (holding that "we shouldnot inquire whether there has been a congressional intent to benefit the would-be plaintiff").

However, the Supreme Court has adopted *NFFE's* reasoning with regard to the zone of interests to be protected under federal statutes aimed at allowing for private competition. For example, in *Air Courier Conference v. American Postal Workers*, 498 U.S. 517, 528 n. 5, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991), the Supreme Court expressly stated "[t]he PES are competition statutes that regulate the conduct of competitors of the Postal Service. . . . Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury."

[28] This court recognizes that in so ruling it is possible that no party will have standing to challenge the DLA's cost comparison. This is not, however, a basis upon which to find standing. *See AFGE v. Cohen*, 171 F.3d at 471 n. 12 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)) ("The assumption that if respondents have no standing to sue, no one would have standing is not a reason to find standing ... our system of government leaves many crucial decisions to the political process.") (alteration in original).

tiffs cannot establish standing under the APA and therefore are not "interested parties" able to maintain this action under the ADRA.

CONCLUSION

Based on the forgoing, this court GRANTS defendant's motion to dismiss. In addition, this court DENIES plaintiffs' motion for preliminary injunction and cross motion for judgment on the administrative record. The clerk is directed to enter judgment accordingly. The parties shall bear their own costs.

APPENDIX C

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART IV—JURISDICTION AND VENUE CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

28 U.S.C.A. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a

contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

[(3) Repealed. Pub.L. 104-320, § 12(a)(2), Oct. 19, 1996, 110 Stat. 3874]

(b)(1) Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action

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[1] So in original.

within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

CREDIT(S)

1994 Main Volume

(June 25, 1948, c. 646, 62 Stat. 940; July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub.L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub.L. 92-415, § 1, 86 Stat. 652; Nov. 1, 1978, Pub.L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub.L. 96-417, Title V, § 509, 94 Stat. 1743; Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(a), 96 Stat. 39; Oct. 29, 1992, Pub.L. 102-572, Title IX, §§ 902(a), 907(b)(1), 106 Stat. 4516, 4519.)

(As amended Oct. 19, 1996, Pub.L. 104-320, § 12(a), 110 Stat. 3874.)

APPENDIX D

UNITED STATES PUBLIC LAWS
104th Congress—Second Session

PL 104-320 (HR 4194)
October 19, 1996

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

An Act to reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

5 USCA § 571 NOTE

SECTION 1. SHORT TITLE.

This Act may be cited as the "Administrative Dispute Resolution Act of 1996".

5 USCA § 571

SEC. 2. AMENDMENT TO DEFINITIONS.

Section 571 of title 5, United States Code, is amended—

(1) in paragraph (3)—

(A) by striking ", in lieu of an adjudication as defined in section 551(7) of this title,";

(B) by striking "settlement negotiations,"; and

(C) by striking "and arbitration" and inserting "arbitration, and use of ombuds"; and

SEC. 12. JURISDICTION OF THE UNITED STATES COURT OF FEDERAL CLAIMS AND THE DISTRICT COURTS OF THE UNITED STATES: BID PROTESTS.

28 USCA § 1491

(a) BID PROTESTS.—Section 1491 of title 28, United States Code, is amended—

(1) by redesignating subsection (b) as subsection (c);

(2) in subsection (a) by striking out paragraph (3); and

(3) by inserting after subsection (a), the following new subsection:

"(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

"(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

"(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

"(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.".

28 USCA § 1491 NOTE

(b) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date.

(c) STUDY.—No earlier than 2 years after the effective date of this section, the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

(d) SUNSET.—The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.

(e) SAVINGS PROVISIONS.—

(1) ORDERS.—A termination under subsection (d) shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms

until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(2) PROCEEDINGS AND APPLICATIONS.—(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination.

31 USCA § 3556

31 USCA § 3556 NOTE

(f) NONEXCLUSIVITY OF GAO REME-DIES.—In the event that the bid protest jurisdiction of the district courts of the United States is terminated pursuant to subsection (d), then section 3556 of title 31, United States Code, shall be amended by striking "a court of the United States or" in the first sentence.

Approved October 19, 1996.

APPENDIX E

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

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28 U.S.C.A. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor

arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

CREDIT(S)

1994 Main Volume

(June 25, 1948, c. 646, 62 Stat. 940; July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub.L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub.L. 92-415, § 1, 86 Stat. 652; Nov. 1, 1978, Pub.L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub.L. 96-417, Title V, § 509, 94 Stat. 1743; Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(a), 96 Stat. 39; Oct. 29, 1992, Pub.L. 102- 572, Title IX, §§ 902(a), 907(b)(1), 106 Stat. 4516, 4519.)

28 U.S.C.A. § 1491

28 USCA § 1491

APPENDIX F

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON. D.C. 20503

CIRCULAR NO. A-76 (REVISED 1999)

August 4, 1983

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Performance of Commercial Activities

1. Purpose. This Circular establishes Federal policy regarding the performance of commercial activities and implements the statutory requirements of the Federal Activities Inventory Reform Act of 1998, Public Law 105-270. The Supplement to this Circular sets forth the procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.

2. Rescission. OMB Circular No. A-76 (Revised), dated March 29, 1979; and Transmittal Memoranda 1 through 14 and 16 through 18.

3. Authority. The Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*), The Office of Federal Procurement Policy Act Amendments of 1979. (41 U.S.C. 401 *et seq.*), and The Federal Activities Inventory Reform Act of 1998. (P. L. 105-270).

4. Background.

a. In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.

b. This national policy was promulgated through Bureau of the Budget Bulletins issued in 1955, 1957 and 1960. OMB Circular No. A-76 was issued in 1966. The Circular was previously revised in 1967, 1979, and 1983. The Supplement (Revised Supplemental Handbook) was previously revised in March 1996 (Transmittal Memorandum 15).

5. Policy. It is the policy of the United States Government to:

a. *Achieve Economy and Enhance Productivity.* Competition enhances quality, economy, and productivity. Whenever commercial sector performance of a Government operated commercial activity is permissible, in accordance with this Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work. When conducting cost comparisons, agencies must ensure that all costs are considered and that these costs are realistic and fair.

b. *Retain Governmental Functions In-House.* Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

c. *Rely on the Commercial Sector.* The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular and its Supplement, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.

6. Definitions. For purposes of this Circular:

a. A *commercial activity* is one which is operated by a Federal executive agency and which provides a product or

service that could be obtained from a commercial source. Activities that meet the definition of an inherently Governmental function provided below are not commercial activities. A representative list of commercial activities is provided in Attachment A. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

b. A *conversion to contract* is the changeover of an activity from Government performance to performance under contract by a commercial source.

c. A *conversion to in-house* is the changeover of an activity from performance under contract to Government performance.

d. A *commercial source* is a business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia or the Commonwealth of Puerto Rico, which provides a commercial product or service.

e. An *inherently Governmental function* is a function which is so intimately related to the public interest as to mandate performance by Government employees. Consistent with the definitions provided in the Federal Activities Inventory Reform Act of 1998 and OFPP Policy Letter 92-1, these functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of inherently Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories:

(1) The *act of governing*; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value

judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

(2) *Monetary transactions and entitlements*, such as tax collection and revenue disbursements; control of the Treasury accounts and money supply; and the administration of public trusts.

f. A *cost comparison* is the process of developing an estimate of the cost of Government performance of a commercial activity and comparing it, in accordance with the requirements of the Supplement, to the cost to the Government for contract performance of the activity.

g. *Directly affected parties* are Federal employees and their representative organizations and bidders or offerors on the instant solicitation.

h. *Interested parties* for purposes of challenging the contents of an agency's Commercial Activities Inventory under the Federal Activities Inventory Reform Act of 1998 are:

(1) A private sector source that (A) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

(2) A representative of any business or professional association that includes within its membership private sector sources referred to in (1) above.

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

(4) The head of any labor organization referred to in section 7103(a) (4) of Title 5, United States Code that includes within its membership officers or employees of an organization referred to in (3) above.

7. Scope.

a. Unless otherwise provided by law, this Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies.

b. This Circular and its Supplement apply to printing and binding only in those agencies or departments which are exempted by law from the provisions of Title 44 of the U.S. Code.

c. This Circular and its Supplement shall not:

(1) Be applicable when contrary to law, Executive Orders, or any treaty or international agreement;

(2) Apply to inherently Governmental functions as defined in paragraph 6.e.;

(3) Apply to the Department of Defense in times of a declared war or military mobilization;

(4) Provide authority to enter into contracts;

(5) Authorize contracts which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship.

(6) Be used to justify conversion to contract solely to avoid personnel ceilings or salary limitations;

(7) Apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement; or

(8) Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part 1, Chapter 3, paragraph K of the Supplement, "Appeals of Cost Comparison Decisions" and as set forth in Appendix 2, Paragraph G, consistent with Section 3 of the Federal Activities Inventory Reform Act of 1998.

d. The requirements of the Federal Activities Inventory Reform Act of 1998 apply to the following executive agencies:

(1) an executive department named in 5 USC 101,

(2) a military department named in 5 USC 102, and

(3) an independent establishment as defined in 5 USC 104.

e. The requirements of the Federal Activities Inventory Reform Act of 1998 do not apply to the following entities or activities:

(1) the General Accounting Office,

(2) a Government corporation or a Government controlled corporation as defined in 5 USC 103,

(3) a non-appropriated funds instrumentality if all of its employees are referred to in 5 USC 2105(c), or

(4) Depot-level maintenance and repair of the Department of Defense as defined in 10 USC 2460.

8. Government Performance of a Commercial Activity. Government performance of a commercial activity is authorized under any of the following conditions:

a. *No Satisfactory Commercial Source Available.* Either no commercial source is capable of providing the needed product or service, or use of such a source would cause unacceptable delay or disruption of an essential program. Findings shall be supported as follows:

(1) If the finding is that no commercial source is capable of providing the needed product or service, the efforts made to find commercial sources must be documented and made available to the public upon request. These efforts shall include, in addition to consideration of preferential procurement programs (see Part I, Chapter 1, paragraph C of the Supplement) at least three notices describing the requirement in the *Commerce Business Daily* over a 90-day period or, in cases of *bona fide* urgency, two notices over a 30-day period. Specifications and requirements in the solicitation shall not be unduly restrictive and shall not exceed those required of in-house Government personnel or operations.

(2) If the finding is that a commercial source would cause unacceptable delay or disruption of an agency program, a written explanation, approved by the assistant secretary or designee in paragraph 9.a. of the Circular, must show the specific impact on an agency mission in terms of cost and performance. Urgency alone is not adequate reason to continue in-house operation of a commercial activity. Temporary disruption resulting from conversion to contract is not sufficient support for such a finding, nor is the possibility of a strike by contract employees. If the commercial activity has ever been performed by contract, an explanation of how the instant circumstances differ must be documented. These decisions must be made available to the public upon request.

(3) Activities may not be justified for in-house performance solely on the basis that the activity involves or supports a classified program or the activity is required to perform an agency's basic mission.

b. *National Defense.*

(1) The Secretary of Defense shall establish criteria for determining when Government performance of a commercial activity is required for national defense reasons. Such criteria shall be furnished to OMB, upon request.

(2) Only the Secretary of Defense or his designee has the authority to exempt commercial activities for national defense reasons.

c. *Patient Care.* Commercial activities performed at hospitals operated by the Government shall be retained in-house if the agency head, in consultation with the agency's chief medical director, determines that in-house performance would be in the best interests of direct patient care.

d. *Lower cost.* Government performance of a commercial activity is authorized if a cost comparison prepared in accordance with the Supplement demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source.

9. Action Requirements. To ensure that the provisions of this Circular and its Supplement are followed, each agency head shall:

a. Designate an official at the assistant secretary or equivalent level and officials at a comparable level in major component organizations to have responsibility for implementtation of this Circular and its Supplement within the agency.

b. Establish one or more offices as central points of contact to carry out implementation. These offices shall have

access to all documents and data pertinent to actions taken under the Circular and its Supplement and will respond in a timely manner to all requests concerning inventories, schedules, reviews, results of cost comparisons and cost comparison data.

c. Be guided by Federal Acquisition Regulation (FAR) Subpart 24.2 (Freedom of Information Act) in considering requests for information.

d. Implement this Circular and its Supplement with a minimum of internal instructions. Cost comparisons shall not be delayed pending issuance of such instructions.

e. Ensure the reviews of all existing in-house commercial activities are completed within a reasonable time in accordance with the Federal Activities Inventory Reform Act of 1998 and the Supplement.

10. Annual Reporting Requirement. As required by the Federal Activities Inventory Reform Act of 1998 and Appendix 2 of the Supplement, no later than June 30 of each year, agencies shall submit to OMB a Commercial Activities Inventory and any supplemental information requested by OMB. After review and consultation by OMB, agencies will transmit a copy of the Commercial Activities Inventory to Congress and make the contents of the Inventory available to the public. Agencies will follow the process provided in the Supplement for interested parties to challenge (and appeal) the contents of the inventory.

11. OMB Responsibility and Contact Point. All questions or inquiries should be submitted to the Office of Management and Budget, Room 6002 NEOB, Washington, DC 20503. Telephone number (202) 395-6104, FAX (202) 395-7230.

12. Effective Date. This Circular and the changes to its Supplement are effective immediately.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No.
C90-0001-L(A)

DARYL A. DIEBOLD, *et al*,.
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This action is submitted to the Court on the motions of the defendants to dismiss, on motions to amend the complaint, and on motions to intervene.[1] Before ruling, the Court will briefly relate the procedural history of this case.

The mess halls at Kentucky's Fort Knox were previously staffed by civilian employees of the United States. In accordance with statutory and regulatory directive, Fort Knox conducted a cost comparison to determine whether it would be more economical to contract with a private entity to, perform the food service activities. In 1988, despite issues having been raised as to certain figures, the United States entered into a contract with the defendant Colbar, Inc. for operating the Fort Knox mess halls.[2]

Plaintiffs were civilian employees working in the Fort Knox food service operations. After Colbar took over the

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[1] Defendants' motion to stay proceedings is moot.

[2] A full recitation of the facts appears in *Diebold v. United States,* 947 F.2d 878 (6th Cir. 1991).

operations, each plaintiff (and proposed intervenor) either lost employment altogether or suffered a loss in income. Plaintiffs filed this action in 1990 alleging that the Army miscalculated the comparative cost of in-house versus outside operations of the dining halls, thereby violating statutes and regulations governing the agency's decision to contract with a private company.

This Court held in 1990 that it lacked subject matter jurisdiction because the "contracting out" decision was committed to agency discretion. Thus, because this Court determined that the complaint failed to state a claim upon which relief could be granted, we did not reach the question of the standing of the plaintiffs to pursue the claim.

The United States Court of Appeals for the Sixth Circuit reversed. *Diebold v. United States*, 947 F.2d 878 (6th Cir. 1991). As this Court had not reached the issue of standing, the appellate court did not address that question, but remanded for trial court consideration. The issue has now been fully briefed and is squarely presented for decision.

Despite the arguments of defendants, we see no serious issue as to plaintiffs' constitutional standing. The complaint sufficiently alleges injury in fact as to each plaintiff by virtue of the award of the contract to Colbar. To the extent that defendants' argument is based on the "temporary" status of the two original named plaintiffs, it is obvious that there are a number of candidates for intervention who would not fall into that category, and dismissal on that basis would be overly technical.

However, defendants vigorously contend that plaintiffs are unsuitable plaintiffs in that they lack prudential standing, i.e., the interest arguably within the "zone of regulated by the statute . . . they seek to protect is not interests to be protected or in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). The question is a difficult one.

In *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987), the Court re-emphasized that the test for prudential standing under the Administrative Procedure act is not rigorous:

> The "zone of interest," test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.*

Id. at 399-400 [emphasis added].

In *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989), the only case we have found directly on point, the two-judge majority relied on the above-quoted language in holding that former civilian employees lack standing to challenge a "contracting out" decision. The dissent opined to the contrary that *Clark, supra,* and *Association of Data Processing Organizations, supra,* strongly support a finding of prudential standing on the part of such employees. After a careful examination of the applicable authority and legislative history, and with all due respect for the majority in the *Cheney* case, we conclude that plaintiffs herein have prudential standing.

The process of reviewing commercial activities to determine whether they should be conducted by private contractors rather than by government employees has been carried on for approximately forty years under the dictates of Circular A-76, an executive branch policy. When Congress

addressed itself to the particulars of commercial activity cost comparisons, it did not seek to eliminate Circular A-76; rather, it clearly intended to graft onto A-76 both the requirement that comparisons be accurate and realistic and a concern for the input—and the welfare—of the federal employees currently performing the activity. Thus, for example, the legislative record reflects this criticism of A-76:

> The policy, however, has not been effectively implemented because it was widely perceived as a government contracting out program and a threat to the job status of federal managers and workers. . . . OMB revised Circular A-76 in August 1983 . . . This change was intended to assure selection of the most economical means of obtaining commercial products and services and to provide fair treatment for affected federal employees.

134 Cong. Rec. H2712, 2724-2725.

The Congressional debate regarding various aspects of cost comparison on commercial activities is replete with examples of contracts awarded pursuant to A-76 that ended up costing a great deal more than forecast. Speakers identified as a primary problem the failure to rely sufficiently on current employees to make the policy succeed:

> OMB Circular A-76 allows minimal employee participation in the creation of the government's bid. However, as A-76 is currently applied, employees are realistically excluded from the process of creating the most efficient organization to compete with the contractors' bids.

135 Cong. Rec. S1420, 1421.

To correct the fact that A-76, standing alone, failed to provide sufficient opportunity for current employees to assist in insuring that comparisons were fair and reasonable,

Congress imposed a statutory requirement that the person responsible for determining whether to convert to contractor performance

> shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, *consult with civilian employees who will be affected by that determination* and consider the views of such employees on the development and preparation of that statement and that study.

10 U.S.C. Sec. 2467(b)(1)(A) [emphasis added].

The intent behind such a requirement was explained as follows:

> Consulting current employees who actually do the work will give those employees the opportunity to point out any omissions, so bids will be solicited for the full workload that the contractors will be expected to perform. It will also help improve employee morale by keeping them informed about a process in which they know their jobs are at stake.

134 Cong. Rec. H2712, 2714.

We emphasize that we are not suggesting that there exists statutory language explicitly *granting* judicial standing to plaintiffs such as ours. Such an affirmative grant is, of course, unnecessary[3] However, explicit statutory language requires consultation with current employees prior to award. By enacting such language, Congress has expressed confidence

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[3] Similarly, we are not concerned that there was an unsuccessful attempt to grant a judicial remedy to federal employees. The defeat of that initiative can hardly be read as evincing Congressional intent to forbid a suit such as this in light of the fact that the bill would have authorized a judicial trial de novo, rather in place of the usual standard of review of agency decisions.

that involving current employees in the cost comparison process serves the statutory interests of accuracy, fairness and economy. Unless the purpose of the cost comparison process were simply to move all functions to the private sector, encouraging employee consultation prior to award and slamming the door thereafter would make little sense.

If the legislative intent were to transfer as many commercial activities as possible to the private sector, we would have to agree with the District of Columbia Circuit that current employees' interests are inconsistent with the purposes of the statute. However, we see no evidence of such an intent. Indeed, the Secretary of Defense himself has promulgated implementing regulations reflecting an understanding that the goal is economy and *fair* competition, with all bidders including in-house workers, given a fair chance. For example, 32 CFR 169a.17(g)(1) refers to the Government as a bidder/offeror. Similarly, 32 CFR 169a.18 sets forth the administrative appeal procedure,[4] and Part 169a, Appendix D makes it clear that "In-house" is as suitable an administrative appellant as "Contractor." The current version of 32 CFR 169a.4 states the policies being implemented. It does not suggest any preference for outside contractors, and it affirmatively includes the following goals:

> (d) Encourage competition with the objective of enhancing quality, economy, and performance;
>
> . . .
>
> (g) Provide a variety of placement assistance to employees whose Federal jobs are eliminated through CA competitions.

32 CFR 169a.4.

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[4] This appeal procedure is not applicable to questions of award to one bidder in preference to another.

Thus, as we view the matter, the legislative intent was to place a gloss on the Circular A-76 process, mandating consultation with current employees in order to make the process fair and competitive and the outcome efficient, realistic, and fiscally predictive. In the current suit, plaintiffs contend that the A-76 process at Fort Knox was not fair and competitive, such that the outcome is not realistic.

Thus, the purpose of the statues specifying how cost comparisons are to be conducted is to arrive at the most economical way of carrying out commercial activities, and avoiding artificially inflated or deflated figures so that the comparison is accurate. That is also the goal of the complaint herein. The interests of plaintiffs and the statutory goals coincide methodically chance coincidence of interest between plaintiffs and not fortuitously. This makes this case readily distinguishable from *American Federation of Government Employees v. Dunn*, 561 F.2d 1310 (9th Cir. 1977) and *American Federation of Government Employees v. Stetson*, 640 F.2d 642 (5th Cir. 1981), cases in which the purpose of the statute in question was to protect employees of contractor who undertook to perform commercial activities.

We are fully aware that plaintiffs' ultimate goal is retention of their federal jobs; however, the self-interest of the plaintiffs in *Clarke, supra,* and in *Association of Data Processing, supra,* did not serve to move them out of the zone of interests. Given that plaintiffs seek the opportunity to prove that the award of the contract to Colbar will cost the government more money than performing the work in-house, it simply cannot be said that plaintiffs' interests are either inconsistent with or only marginally related to the legislative purposes. We believe the interests the complaint herein seeks to protect are squarely within the interests to be served by the legislation.

We turn next to the claim of defendant Colbar, Inc. that it is not a proper defendant in that it is not alleged to have

committed wrongful acts that damaged plaintiffs. With respect to the original claim for injunctive relief, Colbar is clearly a person "needed for just adjudication" in that it claims an interest in the contract that is the subject matter of the action and would be unable to protect that interest if not a party to this suit. *See* Fed. R.Civ.P.19(a). Furthermore, we cannot agree that a separate analysis of prudential standing would lead to dismissal of Colbar.

A much different issue, however, is presented by plaintiffs' proposal to amend the complaint to seek damages and punitive damages because of alleged fraud on the part of Colbar. The jurisdictional vehicle used to obtain review in this Court is the Administrative Procedure Act, which allows the United States to be a party in an action "seeking relief other than money damages." 5 U.S.C. Sec. 702. The scope of review set forth in 5 U.S.C. Sec. 706 encompasses only injunctive and declaratory relief.

As this is a court of limited jurisdiction, plaintiff has the obligation of identifying authority that would allow this court to assume jurisdiction of the subject matter of the proposed damages claim against Colbar. Plaintiff has made no effort to fulfill this duty. The Administrative Procedure Act is not an independent source of subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). Neither does any substantive statute that has been mentioned in this action justify the proposed damages claim against Colbar. Thus, plaintiff has failed to show that the proposed amendment to seek damages is appropriate.

It appears that the motions to intervene are contingent on the success of the motions to amend. Consequently, as we deny the motions to amend, we deny as well the motions to intervene.

IT IS ORDERED that the motion of the United States to stay is dismissed as moot.

IT IS FURTHER ORDERED that the amended motions to dismiss are denied.

IT IS FURTHER ORDERED that all motions to amend complaint are denied.

IT IS FURTHER A ORDERED that all motions to intervene are denied.

IT IS FURTHER ORDERED that the request for trial by jury is denied.

IT IS FURTHER ORDERED that within eleven days of the date of this order, counsel shall contact Courtroom Deputy Clerk Ms. Lips, (502) 582-5156, for the purpose of arranging a suitable date for a scheduling conference.

This is not a final order.

April 2,1993

/s/ Charles M. Allen
CHARLES M. ALLEN
Senior United 'States District Judge

cc: Counsel of Record

ENTERED
APR 2 1993
Jesse W. Grider, Clerk
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION No. C 90-1-L-A

DARYL A. DIEBOLD, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

MEMORANDUM OPINION

On May 10, 1995, after receiving the benefit of memoranda and oral argument, the Court denied defendants' motion for summary judgment. The matter is now before the Court on plaintiffs' motion for summary judgment and on defendants' motion to reconsider.

Defendants continue to insist that the cost of supervising the military personnel who perform clean-up duties in the dining areas should not be included in the cost comparison. We understand defendants' position, and we understand that Fort Knox decided that such supervision would be performed by military personnel regardless of whether the dining hall was operated by salaried civilian personnel or by a contractor, but we continue of the opinion that the value of such supervision is a cost properly included for comparison purposes. There is no dispute concerning the fact that such supervision could be performed by Army employees (civilian or military), but could *not* be performed by contract personnel.

It may be that the complexity arises from the fact that the only two options ever seriously considered were neither

purely "in-house," nor purely "contracted out." That is, Fort Knox never considered having its military personnel operate the dining halls, nor did it consider having all clean-up performed by non-military personnel. The "DFAs" could not be supervised by contract cooks although they could be supervised by civilian employees of the Army. At some point, the Army simply decided that the DFAs would no longer be supervised by civilians (whether those civilians were Army employees or contract employees). However, that decision was merely an option with regard to "in-house" operations, but legally required with regard to "contracted-out" operations. We continue to believe that the decision to use non-military people to operate the dining hall (whether those people were civil service or contractor employees) and to use DFAs for clean up necessitated including the expense of supervision of the DFAs as a cost of the operation, as pointed out by the GAO. This is the only reasonable way to make a fair comparison of the costs "necessitated" by the contracting-out decision. As the cost of supervision was not so included, federal regulations were violated.

No party suggests that there is any dispute of fact. Accordingly, we will enter summary judgment in favor of plaintiffs. However, we do not believe it would be proper for the federal court to oversee the details of conversion plans, and we decline plaintiffs' invitation to participate in that process. Consequently, our judgment will be final.

August 3, 1995

/s/ Charles M. Allen
CHARLES M. ALLEN
Senior United 'States District Judge

cc: Counsel of Record

ENTERED
AUG 3 1995
Jeffrey A. Apperson, Clerk
BY Deputy Clerk

APPENDIX H

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 P.L. 104-320, ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 DATES OF CONSIDERATION AND PASSAGE

House: September 27, October 4, 1996
Senate: September 30, 1996
Cong. Record. Vol 142 (1996)

RELATED REPORTS
House Report (Judiciary Committee) No. 104-597,
May 29, 1996

(To accompany H.R. 2977)
Senate Report (Governmental Affairs Committee)
No. 104-245,
Mar. 27, 1996

(To accompany S. 1224)
House Conference Report No. 104-841,
Sept. 25, 1996
(To accompany H.R. 2977)

HOUSE CONFERENCE REPORT NO. 104-841
September 25, 1996

Mr. Hyde, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2977]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2977), to reauthorize alternative means of dispute

resolution in the Federal administrative process, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Administrative Dispute Resolution Act of 1996".

SEC. 2. AMENDMENT TO DEFINITIONS.

Section 571 of title 5, United States Code, is amended-

(1) in paragraph (3)-

(A) by striking ", in lieu of an adjudication as defined in section 551(7) of this title,";

(B) by striking "settlement negotiations,"; and

(C) by striking "and arbitration" and inserting "arbitration, and use of ombuds"; and

(2) in paragraph (8)-

(A) in subparagraph (B) by striking "decision," and inserting "decision;"; and

(B) by striking the matter following subparagraph (B).

* * * *

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2977) to reauthorize alternative means of dispute resolution in the Federal administrative process, and for otherpurposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

The conferees incorporate by reference in this Statement of Managers the legislative history reflected in both House Report 104-597 and Senate Report 104-245. To the extent not otherwise inconsistent with the conference agreement, those reports give expression to the intent of the conferees.

Section 3-House recedes to Senate amendment with modifications. This section clarifies that, under 5 U.S.C. section 574, a dispute resolution communication between a party and a neutral or a neutral and a party that meets the requirements for confidentiality in section 574 is also exempt from disclosure under FOIA. In addition, a dispute resolution communication originating from a neutral and provided to all

of the parties, such as Early Neutral Evaluation, is protected from discovery under 574(b)(7) and from disclosure under FOIA. A dispute resolution communication originating from a party to a party or parties is not protected from disclosure by the ADR Act.

The Managers recognize that the intent of the Conference Agreement not to exempt from disclosure under FOIA a dispute resolution communication given by one party to another party could be easily thwarted if a neutral in receipt of a dispute resolution communication agrees with a party to in turn pass the communication on to another party. It is the intent of the Managers that if the neutral attempts to circumvent the prohibitions of the ADR Act in this manner, the exemption from FOIA would not apply.

As with all other FOIA exemptions, the exemption created by section 574(j) is to be construed narrowly. The Managers would not expect the parties to use the new exemption as a mere sham to exempt information from FOIA. Thus, for example, we would not expect litigants to resort to ADR principally as a means of taking advantage of the new exemption. In such a case the new exemption would not apply.

Section 7-Senate recedes to House with a modification. This section requires the President to designate an agency or to designate or establish an interagency committee to facilitate and encourage the use of alternative dispute resolution. The Managers encourage the President to designate the same entity under this provision as is designated under section 11 (regarding Negotiated Rulemaking). This would promote the coordination of policies, enhance institutional memory on the relevant issues, and make more efficient the use of ADR and Negotiated Rulemaking.

Section 8-House recedes to Senate amendment with modifications. This section permits the use of binding

arbitration under certain conditions, and clarifies that an agency cannot exceed its otherwise applicable settlement authority in alternative dispute resolution proceedings.

The head of an agency that is a party to an arbitration proceeding will no longer have the authority to terminate the proceeding or vacate any award under 5 U.S.C. section 580. However, it is the Managers' intent that an arbitrator shall not grant an award that is inconsistent with law. In addition, prior to the use of binding arbitration, the head of each agency, in consultation with the Attorney General, must issue guidelines on the use and limitations of binding arbitration.

Section 11-House recedes to Senate amendment with modifications. This section permanently reauthorizes the Negotiated Rulemaking Act of 1990. The President is required to designate an agency or interagency committee to facilitate and encourage the use of negotiated rulemaking.

In addition, this section requires the Director of the Office of Management and Budget to take action to expedite the establishment of negotiated rulemaking committees and committees to resolve disputes under the Administrative Dispute Resolution Act. It is the understanding of the Managers that the Federal Advisory Committee Act (FACA) applies to proceedings under the Negotiated Rulemaking Act, but does not apply to proceedings under the Administrative Dispute Resolution Act. The Director also is required to submit recommendations to Congress for any necessary legislative changes within one year after enactment.

The Managers deleted language in paragraph (b)(1)(B) determining that property accepted under this section shall be considered a gift to the United States for federal tax purposes because the Managers determined that the language merely repeated current law.

Section 12-House recedes to Senate amendment with modifications. This section consolidates federal court

jurisdiction for procurement protest cases in the Court of Federal Claims. Previously, in addition to the jurisdiction exercised by the Court of Federal Claims, certain procurement protest cases were subject to review in the federal district courts. The grant of exclusive federal court jurisdiction to the Court of Federal Claims does not affect in any way the authority of the Comptroller General to review procurement protests pursuant to Chapter 35 of Title 31, U.S. Code.

This section also applies the Administrative Procedure Act standard of review previously applied by the district courts (5 U.S.C. sec. 706) to all procurement protest cases in the Court of Federal Claims. It is the intention of the Managers to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims. This section is not intended to affect the jurisdiction or standards applied by the Court of Federal Claims in any other area of the law.

HENRY HYDE,
GEORGE W. GEKAS,
MICHAEL PATRICK FLANAGAN,
JOHN CONYERS, JR.,
JACK REED,

Managers on the Part of the House.

TED STEVENS,
BILL COHEN,
CHUCK GRASSLEY,
JOHN GLENN,
CARL LEVIN,

Managers on the Part of the Senate.

H.R. CONF. REP. 104-841, H.R. Conf. Rep. No. 841, 104TH Cong., 2ND Sess. 1996, 1996 WL 563326 (Leg.Hist.)

APPENDIX I

Congressional Record—Senate
Proceedings and Debates of the 104th Congress,
Second Session
Monday, September 30, 1996

ALTERNATIVE MEANS OF DISPUTE RESOLUTION ACT OF 1996

Mr. GRASSLEY.

Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 4194 which was received from the House.

The PRESIDING OFFICER.

The clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 4194) to reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes.

The PRESIDING OFFICER.

Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

AMENDMENT NO. 5421

(Purpose: To make amendment and to establish concurrent jurisdiction for purposes of hearing bid protests between the district courts of the United States and the United States Court of Federal claims and sunsetting bid protest jurisdiction of the district courts of the United States and other purposes)

Mr. GRASSLEY.

Senator COHEN has an amendment at the desk and I ask for its immediate consideration.

The PRESIDING OFFICER.

The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Iowa <Mr. GRASSLEY>, for Mr. COHEN, proposes an amendment numbered 5421.

Mr. GRASSLEY.

I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER.

Without objection, it is so ordered.

The amendment is as follows:

At the end of the bill insert the following:

SEC. 12. JURISDICTION OF THE UNITED STATES COURT OF FEDERAL CLAIMS AND THE DISTRICT COURTS OF THE UNITED STATES: BID PROTESTS.

(a) BID PROTESTS.-Section 1491 of Title 28, United States code, is amended-

(1) by redesignating subsection (b) as subsection (c);

(2) in subsection (a) by striking out paragraph (3); and

(3) by inserting after subsection (a), the following new subsection:

"(b) (1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids

or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

"(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

"(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

"(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."

(b) EFFECTIVE DATE.-This section and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date.

(c) STUDY.-No earlier than 2 years after the effective date of this section, the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of federal procurement law.

(d) SUNSET.-The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code, (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.

(e) SAVINGS PROVISIONS.-

(1) ORDERS.-A termination under subsection (d) shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(2) PROCEEDINGS AND APPLICATIONS.-(A) A termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination.

"(f) NONEXCLUSIVITY OF GAO REMEDIES.-In the event that the bid protest jurisdiction of the district

courts of the United States is terminated pursuant to subsection (d), then section 3556 of title 31, United States Code, shall be amended by striking "a court of the United States or" in the first sentence.

Mr. COHEN.

Mr. President, the amendment I am offering this morning to H.R. 4194, a bill to reauthorize alternative means of dispute resolution in the Federal administrative process, is the result of a compromise reached last night with the other house.

The amendment deals with the issue of bid protest jurisdiction in the Federal district courts and the U.S. Court of Federal Claims. The amendment will expand the bid protest jurisdiction of the Court of Federal Claims. It should be noted, however, that this amendment in no way expands the jurisdiction of the Court of Federal Claims beyond bid protests or changes the standard of review in any other area of jurisdiction of the Court of Federal Claims.

Currently, the Court of Federal Claims only has jurisdiction over bid protests which are filed before a contract award is made. My amendment provides for both preand post-award jurisdiction. The Federal district courts also have jurisdiction over bid protests. Prior to a 1969 Federal court decision, however, the Federal district courts had no jurisdiction over Federal contract awards. A Federal district court, in Scanwell Lab., Inc. versus Shaffer, held that a contractor can challenge a Federal contract award in Federal district court under the Administrative Procedures Act.

It is my belief that having multiple judicial bodies review bid protests of Federal contracts has resulted in forum shopping as litigants search for the most favorable forum. Additionally, the resulting disparate bodies of law between the circuits has created a situation where there is no national uniformity in resolving these disputes. That is why I have

included provisions in this amendment for studying the issue of concurrent jurisdiction and have provided for the repeal of the Federal district courts' Scanwell jurisdiction after the study is complete in 2001.

The chamber of commerce fully supports this language as do our colleagues in the other chamber.

I would like to express my deep gratitude for the willingness of my colleagues and their staffs in both houses to work with me and my staff to develop this compromise.

Mr. LEVIN.

Mr. President, we all want a government that works better and costs less. In the rush of closing business in this Congress, I am pleased that the Senate has made time for legislation authored by myself and Senator CHUCK GRASSLEY to encourage faster, less costly ways to resolve disputes with the Federal Government. This bill, which has gone through several versions, is now before us as H.R. 4194, and has been approved by both sides of the aisle in the Senate and the House. I am hopeful that, by the end of the day, this legislation will be on its way to the President.

It's a fact of life that many people have disputes with the Federal Government. In the late 1980's, of the 220,000 civil cases filed in Federal court, more than 55,000 involved the Federal Government in one way or another. Resolving these disputes costs taxpayers billions of dollars.

Resolving them before they become courtroom dramas is one way to make a dent in this billion-dollar drain on taxpayer funds. Mediation, arbitration, mini trials and other methods offer cheaper, faster alternatives to courtroom battles.

That's why, 6 years ago, Senator GRASSLEY and I cosponsored the Administrative Dispute Resolution Act of 1990. It is why we have teamed up again this year to

reauthorize and fine-tune that Act and make it a permanent part of U.S. law. Perhaps the most important improvement we would make is to expand the alternative dispute resolution or ADR tools available to Federal agencies by making binding arbitration a more attractive option. The bill takes two steps to do so. First, it would eliminate a one-way escape clause that allowed Federal agencies, but not private parties, unilaterally to vacate a binding arbitration award that disadvantaged the government. In the 5 years this escape clause has been on the books, no one has ever agreed to an arbitration proceeding with the Government on this basis. Eliminating this unilateral escape clause is expected to encourage more private parties to agree to use binding arbitration as a cost-saving alternative to civil litigation. Second, the bill would put into place several safeguards to protect the United States from improper or unwise use of this ADR technique, including requiring agencies to think through, ahead of time and in writing, when binding arbitration should be used; requiring every agreement to use binding arbitration to be in writing and to specify the maximum dollar award that an arbitrator may award against the United States; and ensuring that agency officials cannot even offer to use binding arbitration unless the official already has authority to settle the matter.

Also, to ensure that binding arbitration remains a voluntary procedure, the bill maintains the provision in the ADR law, 5 U.S.C. 575(a)(3), which prohibits Federal agencies from requiring individuals to agree to use binding arbitration to settle disputes as a condition of entering into a contract or obtaining a benefit. Both the bill sponsors and the authorizing committees intend this provision to include prohibiting an agency from requiring a party to submit to binding arbitration as a condition of Federal employment or to relinquish rights under other laws such as the Civil Rights Act. It is not the intent of the bill to coerce anyone into using binding arbitration.

The bill makes a number of other refinements in the ADR law as well, including clarifying the confidentiality of ADR proceedings; clarifying agency authority to hire mediators and other ADR neutrals on an expedited basis; allowing agencies to accept donated services from State, local and tribal governments to support an ADR proceeding; adding an explicit authorization for appropriations; removing a ban on Federal employees' electing to use ADR methods to resolve certain personnel disputes; and eliminating special paperwork burdens on contractors willing to use ADR to resolve small claims against the Government under the Contract Disputes Act. The bill would also reassign the task of encouraging and facilitating agency use of ADR methods from the Administrative Conference of the United States, which has been terminated due to a lack of appropriations, to an agency or interagency committee to be designated by the President.

In addition to reauthorizing the ADR law, the bill also includes the Levin-Grassley amendment to reauthorize the Negotiated Rulemaking Act of 1990. The Negotiated Rulemaking Act is another reform effort that seeks to interject common sense and cost savings into the way the Federal Government does business. In essence, it allows a Federal agency to form an advisory committee with its regulated community, public interest groups and other interested parties to draft regulations that everyone can support and live by.

As its name implies, the point of the law is to get parties to negotiate with each other and the Federal Government to devise sensible, cost effective rules. No one is required to participate in a negotiation, and no one gives up their rights by agreeing to negotiate. It is a voluntary, rather than a mandatory, process.

Agencies and others have discovered that, in many rulemaking situations, negotiation beats confrontation in terms of cost, time, aggravation, and the ability to develop regulations that parties with very different perspectives can

accept. One industry participant in a negotiated rulemaking involving the Clean Air Act put it this way: "It's a better situation when people who are adversaries can sit down at the table and talk about it rather than throwing bricks at each other in courtrooms and the press." An environmental journal reached the same conclusion, summing up a negotiated rulemaking involving the Grand Canyon with the headline, "See You Later, Litigator." The Washington Post has called negotiated rulemaking "plainly a good idea," while the New York Times has called it "an immensely valuable procedure that ought to be used far more often."

Like ADR, the bill would make the Negotiated Rulemaking Act a permanent fixture in Federal law, while fine-tuning some provisions. The improvements include facilitating agency hiring of neutrals, called convenors and facilitators, on an expedited basis; providing an explicit authorization for appropriations; clarifying the authority of agencies to accept gifts to support negotiated rulemaking proceedings; and reassigning the responsibility for facilitating and encouraging agency use of negotiated rulemaking from the Administrative Conference of the United States, which has been terminated, to an agency or interagency committee to be designated by the President.

If enacted during this Congress, the bill would avoid a lapse in the negotiated rulemaking law which is otherwise scheduled to expire in November. That is why it is so important to pass this legislation before Congress closes its doors for the year.

Finally, the bill would address the unrelated issue of judicial jurisdiction over procurement protests. At present, the Court of Federal Claims reviews some procurement protests, while the Federal district courts have responsibility for others. This overlapping authority has led to forum shopping and has resulted in unnecessary and wasteful litigation over jurisdictional issues. For this reason, the January 1993 report

of the Acquisition Law Advisory Panel (the so- called section 800 Panel) recommended that:

> There should be only one judicial system for consideration of bid protests and that forum should have jurisdiction to consider all protests which can now be considered by the district courts and by the Court of Federal Claims. * * * The Court of Federal Claims should be the single judicial forum with jurisdiction to consider all protests that can presently be considered by any district court or by the Court of Federal Claims.

The original Senate bill contained a provision that would have implemented this recommendation and consolidated Federal court jurisdiction for procurement protests in the Court of Federal Claims.

The revised bill we are taking up today contains a compromise provision that would consolidate the jurisdiction of the Court of Federal Claims and the district courts. For 4 years, the consolidated jurisdiction would be shared by the Court of Federal Claims and the district courts. Each court system would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system. After 4 years, the jurisdiction of the district courts would terminate, and the Court of Federal Claims would exercise exclusive judicial jurisdiction over procurement protests. These provisions addressing Federal court jurisdiction over procurement protests would not affect in any way the authority of the Comptroller General to review procurement protests pursuant to chapter 35 of title 31, U.S. Code, and they would not affect the jurisdiction or standards applied by either the district courts or the Court of Federal Claims in any area of the law other than the procurement protests to which they are addressed.

Mr. President, I would like to thank Senator GRASSLEY, and in particular his staffer, Kolan Davis, for the hard work and leadership he has shown to renew and strengthen the

ADR and negotiated rulemaking laws. I would also like to thank Senator GLENN, Senator COHEN, and Senator STEVENS, from the Governmental Affairs Committee for their continuing support. And this bill would not have had a chance without the hard work, persistence, and creative effort of three House Members and their outstanding staffs, and I would like to thank Congressmen JACK REED, George Gekas, and HENRY HYDE for getting this legislation to the floor despite a crowded calendar. This bill shows that bipartisanship is alive and functioning in this Congress.

Alternative dispute resolution methods and negotiated rulemaking provide new and better ways to conduct government business. They cost less, they're quicker, they're less adversarial, they develop sensible solutions to problems, and they free up courts for other business. They are two success stories in creating a government that works better and costs less.

Mr. GRASSLEY.

Mr. President, I ask unanimous consent that the amendment be agreed to, the bill be deemed read for the third time, passed, the motion to reconsider be laid upon the table, and that any statements relating to the bill be placed at the appropriate place in the RECORD.

The amendment (No. 5421) was agreed to.

The bill (H.R. 4194), as amended, read the third time, and passed.

142 Cong. Rec. S11848-01, 1996 WL 553817 (Cong.Rec.)

Supreme Court, U.S.
FILED
DEC 26 2001

No. 01-664

In the Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
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Assistant Attorney General
DAVID M. COHEN
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QUESTIONS PRESENTED

Pursuant to 28 U.S.C. 1491(b)(1) (Supp. V 1999), the Court of Federal Claims has jurisdiction in "an action by an interested party objecting to * * * any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The questions presented are:

1. Whether federal employees or their labor unions are "interested part[ies]" under 28 U.S.C. 1491(b)(1) and so can challenge an agency's cost-comparison decision that results in the contracting out of services formerly performed by agency employees to a private contractor.

2. Whether federal employees and their unions lack standing to challenge an agency's cost-comparison decision because they are not within the zone of interests protected by the procurement statutes that require cost comparison.

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In the Supreme Court of the United States

No. 01-664

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 258 F.3d 1294. The opinion of the Court of Federal Claims (Pet. App. 15a-44a) is reported at 46 Fed. Cl. 586.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2001. The petition for a writ of certiorari was filed on October 22, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the limits, imposed by Congress and long recognized by the courts, on who may

sue to challenge an agency's procurement-related decision to contract out certain activities to private sources as a way of saving taxpayer dollars. Before 1996, jurisdiction over procurement protests was divided between the Court of Federal Claims and federal district courts. The Court of Federal Claims had jurisdiction over *pre-award* procurement protests brought by disappointed bidders.[1] This jurisdiction was based on the Tucker Act, 28 U.S.C. 1491(a)(1), which authorizes the Court of Federal Claims to "render judgment upon any claim against the United States founded either upon * * * any express or implied contract," and was premised on the existence of an implied-in-fact contractual commitment by the government to evaluate the bids of qualified bidders on procurement contracts fairly and honestly. See *United States* v. *John C. Grimberg Co.*, 702 F.2d 1362, 1367 (Fed. Cir. 1983); *Heyer Prods. Co.* v. *United States*, 135 Ct. Cl. 63 (1956).

In contrast, beginning with the D.C. Circuit's decision in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (1970), federal district courts exercised jurisdiction over certain *post-award* procurement protests under the Administrative Procedure Act (APA), 5 U.S.C. 702. Such *Scanwell* jurisdiction provides that "sufficiently viable runners-up in a procurement process have standing to allege that an illegality in the process caused the contract to go to someone else and not to them." *Free Air Corp.* v. *FCC*, 130 F.3d 447, 450 (D.C. Cir. 1997); see also *International Eng'g Co.* v. *Richardson*, 512 F.2d 573, 579 (D.C. Cir. 1975) (*Scanwell* held

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[1] Prior to 1992, the Court of Federal Claims was the United States Claims Court; prior to 1982, the court's functions were performed by the United States Court of Claims. For simplicity, the court is referred to throughout as the Court of Federal Claims.

only "that a disappointed bidder on a government contract was a person aggrieved under the APA and had standing to seek a limited review of the contract award."), cert. denied, 423 U.S. 1048 (1976); Pet. App. 10a, 11a.

Scanwell jurisdiction is thus generally limited to qualified disappointed bidders. Of particular relevance to this case, the courts of appeals *uniformly* have held that government employees and their unions lack standing under *Scanwell* to challenge government procurement decisions. *E.g.*, *American Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d 460, 469-475 (7th Cir. 1999); *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d 1038, 1052-1054 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990); *American Fed'n of Gov't Employees* v. *Stetson*, 640 F.2d 642, 645-646 (5th Cir. 1981); *American Fed'n of Gov't Employees*, v. *Dunn*, 561 F.2d 1310, 1313 (9th Cir. 1977).

Against this backdrop, Congress passed the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, § 12, 110 Stat. 3874. This statute, which was enacted to resolve problems caused by the divided nature of procurement-protest jurisdiction, provides in part:

> Both the Unties [sic] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action *by an interested party* objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the

> United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. 1491(b)(1) (Supp. V 1999) (emphasis added). The ADRA thus allowed both federal district courts and the Court of Federal Claims to hear "the full range of bid protest cases previously subject to review in either system." 142 Cong. Rec. 26,646 (1996) (statement of Sen. Levin). See Pet. App. 48a-51a.

The ADRA's grant of full and concurrent jurisdiction to the Court of Federal Claims and federal district courts, however, was temporary. To prevent forum shopping and to promote uniformity in government procurement law, Congress sought to channel all jurisdiction over government procurement protests to the Court of Federal Claims. Therefore, as part of the ADRA, Congress enacted a sunset provision that terminated federal district court jurisdiction over bid protests on January 1, 2001. ADRA § 12(d), 110 Stat. 3875; Pet. App. 50a. Consequently, the Court of Federal Claims now has exclusive jurisdiction under Section 1491(b)(1) to hear government procurement protests. *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1079-1080 (Fed. Cir. 2001).[2]

2. a. The procurement challenge in this case involves two government procurement statutes and Circular A-76 of the Office of Management and Budget (OMB). Pursuant to 10 U.S.C. 2462(a), the Department of Defense must procure the supplies and services it needs (except for those necessary for functions that the

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[2] The General Accounting Office (GAO), an Article I administrative forum, also reviews procurement protests, but such administrative review does not exclude judicial review under 28 U.S.C. 1491(b)(1) (Supp. V 1999). See 31 U.S.C. 3551 *et seq.*

Secretary of Defense "determines must be performed by military or Government personnel") from the private sector if a private contractor can provide them at a cost lower than the cost of providing them in-house with government personnel. In making these cost comparisons, the Secretary shall ensure that all costs considered are "realistic and fair." 10 U.S.C. 2462(b).

b. The Federal Activities Inventory Reform Act of 1998 (FAIR), Pub. L. No. 105-270, 112 Stat. 2382 (31 U.S.C. 501 note (Supp. V 1999)), requires all Executive Branch agencies to prepare an annual list of activities that they perform that are not "inherently governmental functions." FAIR § 2(a), 112 Stat. 2382. Using language identical to the cost-comparison provision in 10 U.S.C. 2462(b), FAIR provides that when an agency considers contracting with a private source to perform an activity on this list, it must select the source using a competitive process that includes a "realistic and fair" cost comparison. FAIR § 2(d) and (e), 112 Stat. 2383. It also provides that any "interested party," defined to include prospective contractors, employees of the agency that is an actual or prospective offeror to perform the activity, and their unions, can file an administrative challenge to the inclusion or omission of any activity from the annual list. FAIR § 3, 112 Stat. 2383. FAIR, however, makes no provision for challenging an agency's cost comparison. See Pet. App. 38a-40a.

c. OMB Circular A-76 (Pet. App. 54a-62a) is an internal Executive Branch directive from OMB to the heads of executive agencies. It sets forth "the general policy of the Government to rely on commercial sources to supply the products and services the Government needs." Circular para. 4(a); Pet. App. 54a. The Circular directs that, except for "functions [that] are inherently Governmental in nature," "the Government shall not

start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." Circular paras. 5(b) and (c); Pet. App. 55a. To determine whether an activity that could be performed by the private sector should be contracted out or retained in-house, an agency conducts a comprehensive cost comparison in accordance with the Circular and its Supplement. The activity must then be contracted out unless the cost comparison demonstrates that in-house performance by the government would be more economical than performance by the private sector. Circular paras. 5(a) and 8(d); Pet. App. 55a, 61a. The Circular also provides: "This Circular and its Supplement shall not * * * [e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular," except for the administrative appeal provided by the Circular and by Section 3 of FAIR, which allows administrative challenges to the annual list required by that statute. Circular para. 7(c)(8); Pet. App. 58a, 59a.

3. In accord with 10 U.S.C. 2462(b), FAIR, and Circular A-76, the Defense Logistics Agency (DLA) undertook a cost comparison for material distribution services at the Defense Distribution Depot in Barstow, California. Pet. App. 17a, 19a. DLA first conducted a competitive acquisition among private sources and determined that EG&G Logistics, Inc. (EG&G) offered the best value among the seven private offerors. *Id.* at 17a-18a. Government management submitted its own proposal to perform the same work using government employees. *Id.* at 15a, 17a-18a.

Following receipt and amendment of the EG&G and in-house proposals, DLA compared their costs. It determined that EG&G's cost of $14,521,719 was approximately $2.5 million lower than the in-house cost of $17,032,459. Pet. App. 19a-20a. Accordingly, DLA decided to contract out the Barstow Depot operations to EG&G. *Id.* at 20a. DLA subsequently denied an administrative appeal of the cost comparison brought by Barstow Depot employees and their union, American Federation of Government Employees (AFGE). *Id.* at 20a-21a.

4. Petitioners, two DLA employees at the Barstow Depot and AFGE, filed this action in the Court of Federal Claims challenging DLA's decision to award the Barstow Depot contract to EG&G. Pet. App. 15a, 21a. Petitioners alleged that EG&G substantially underbid the work and that DLA failed to confirm EG&G's costs in violation of 10 U.S.C. 2462(b), FAIR, and OMB Circular A-76. Pet. App. 21a-22a. Petitioners sought to invoke the jurisdiction of the Court of Federal Claims under 28 U.S.C. 1491(b)(1) (Supp. V 1999), which limits the court's procurement-related jurisdiction to actions "by an interested party" to the agency's procurement decision.

The Court of Federal Claims dismissed petitioners' suit for lack of standing. Pet. App. 15a-44a. The court first concluded that its jurisdiction over procurement actions under 28 U.S.C. 1491(b)(1) (Supp. V 1999) was coextensive with that of district courts under the Administrative Procedure Act, 5 U.S.C. 702, so that any person who would have had standing to sue in district court is an "interested party" under Section 1491(b)(1). Pet. App. 32a. The court then held that petitioners, as potentially displaced federal workers and their union, lack standing because they are not

within the zone of interests of 10 U.S.C. 2462 or FAIR. Pet. App. 35a-44a. Although FAIR § 3, 112 Stat. 2383, includes agency employees and their unions as "interested part[ies]," the court noted that this Section is expressly limited to challenges to the initial inclusion or omission of agency activities on the annual list of activities that are appropriate for contracting-out. The court also observed that petitioners in this case do not challenge the inclusion decision, and that nothing in FAIR or its definition of interested parties provides for challenges to an agency's cost comparisons. Pet. App. 38a-39a. In light of this express limitation, the court held that "Congress did not intend for federal employees and their unions to be able to challenge cost comparisons." *Id.* at 39a.

The court also held that the legislative history of FAIR showed that its purpose is to provide the "best value to the American taxpayer," not "to support continued employment by federal workers." Pet. App. 40a (quoting 144 Cong. Rec. S9104 (daily ed. July 28, 1998) (statement of Sen. Thomas)). In addition, the court observed that courts have uniformly rejected the arguments of federal workers and their unions for standing under 10 U.S.C. 2462(b), which contains the same cost-comparison language as Section 2(a) of FAIR. Pet. App. 40a. Further, the court held that "[b]ecause OMB Circular A-76 is an executive order and not a statute or regulation, it does not by itself confer any rights to judicial review." *Id.* at 33a n.18.

5. The Federal Circuit affirmed the district court's dismissal for lack of standing on a different ground, holding that 28 U.S.C. 1491(b)(1)'s (Supp. V 1999) grant of jurisdiction to the Court of Federal Claims to hear procurement challenges brought by "interested part[ies]" includes only challenges brought by bidders

and prospective bidders on government procurement contracts. Pet. App. 1a-14a.

The court of appeals concluded that the text and legislative history of 28 U.S.C. 1491(b)(1) (Supp. V 1999) indicate that Congress intended to confer upon the Court of Federal Claims jurisdiction over post-award procurement protests to the same extent that federal district courts had previously exercised that jurisdiction under *Scanwell*. Pet. App. 10a. The court of appeals reasoned that (1) *Scanwell* jurisdiction generally had been limited to procurement challenges brought by qualified disappointed bidders, and had uniformly been held by the courts of appeals to preclude standing in procurement protests brought by government employees or their labor unions; (2) although Congress expressly adopted the APA's standard of review in another section of the ADRA, 28 U.S.C. 1491(b)(4) (Supp. V 1999) , it chose the term "interested party" to define standing under the ADRA, rather than invoke the APA's standing provision; (3) the term "interested party" is also used in a related procurement statute, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551 *et seq.*, which provides for administrative review of procurement challenges, and which explicitly defines "interested party" to include only "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract," 31 U.S.C. 3551(2) (1994 & Supp. V 1999); and (4) adopting a narrower definition of "interested party" is consistent with the principle that waivers of sovereign immunity, such as contained in 28 U.S.C. 1491(b)(1) (Supp. V 1999), are to be construed narrowly. See Pet. App. 9a-13a. Accordingly, the court of appeals held that "[b]ecause [petitioners] here are

not actual or prospective bidders or offerors, they do not have standing to challenge the DLA's cost comparison analysis or its decision to award the depot services contract to EG&G." *Id.* at 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision below is also consistent with the uniform decisions of the courts of appeals holding that federal employees and their unions are not within the zone of interests protected by the government contracting-out statutes. Accordingly, further review by this Court is unwarranted.

1. The court of appeals correctly held that petitioners are not "interested part[ies]" within the meaning of 28 U.S.C. 1491(b)(1) (Supp. V 1999). Section 1491(b)(1) confers jurisdiction on the Court of Federal Claims in "an action by an interested party objecting to * * * any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The statute, however, does not explicitly define "interested party."

Petitioners argue that potentially displaced employees and their unions are within the plain meaning of "interested party," and they cite a dictionary meaning of "interested" as "[h]aving an interest in something; concerned" or "[p]articipating; * * * having money involved." Pet. 8 n.8. Petitioners' proposed definition is potentially so broad as to encompass persons having only a generalized, academic curiosity about a government contract or an indirect financial interest, such as owning shares in a potential bidder. The court below, in contrast, looked to accepted aides to statutory con-

struction to determine the meaning of "interested party" in Section 1491(b)(1).

As the court of appeals stated, Section 1491(b)(1) was intended to confer upon the Court of Federal Claims post-award procurement-protest jurisdiction previously exercised by the district courts under *Scanwell*. Pet. App. 9a-10a (quoting 142 Cong. Rec. 26,645 (1996) (statement of Sen. Cohen), and H.R. Conf. Rep. No. 841, 104th Cong., 2d Sess. 10 (1996)). Contrary to petitioners' contention, moreover, *Scanwell* and its progeny allowed suits brought by qualified disappointed bidders to challenge the award of a government contract, but *uniformly* held that displaced federal workers and their unions lack standing to challenge an agency's contracting-out procurement decisions. *E.g.*, *American Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d at 469-475; *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d at 1052-1054; *American Fed'n of Gov't Employees* v. *Stetson*, 640 F.2d at 645-646; *American Fed'n of Gov't Employees* v. *Dunn*, 561 F.2d at 1313.[3]

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[3] Petitioners' reliance (Pet. 14) on *Cohen*, 171 F.3d at 469-475, is misplaced. In *Cohen*, the Seventh Circuit held that displaced federal workers and their unions are *not* within the zone of interests protected by the general procurement statutes. *Id.* at 469-474. The court, however, concluded that federal employees and their unions are within the zone of interest of the Arsenal Act, 10 U.S.C. 4532, a specific statutory provision that is not applicable in this case and that petitioners do not seek to invoke. The Seventh Circuit based its standing decision on the fact that unlike most procurement statutes, which focus on saving taxpayer dollars and are antithetical to federal employees' interests in job security, the Arsenal Act "appears to be aimed at preserving the government's in-house military production capabilities." 171 F.3d at 473. Similarly, petitioners' reliance (Pet. 10 n.9, 16, 17 n.20) on the unreported district court decision in *Diebold* v. *United States*, Civ. Action No. C90-0001-L(A) (W.D. Ky. Apr. 2, 1993) (reproduced at

Moreover, those court of appeals decisions rejecting procurement-protest standing for federal employees and their unions are fully consistent with this Court's decision in *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517 (1991), which held that unions representing postal employees lack standing to challenge a rule allowing private courier companies to engage in international remailing because the unions and the employees are not within the zone of interests of the Private Express Statutes, 18 U.S.C. 1693 *et seq.* and 39 U.S.C. 601 *et seq.*

In addition, the court of appeals properly construed "interested party" in Section 1491(b)(1) in accord with the definition of that same term in a related government procurement statute. Pet. App. 13a; see *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (using meaning of "official detention" in related sentencing provisions and the Bail Reform Act of 1984 to aid interpretation of same term in 18 U.S.C. 3585(b), noting same term "should bear the same meaning" in "related" statutes); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943) (using Federal Employers' Liability Act to aid interpretation of Fair Labor Standards Act of 1938). The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551 *et seq.*, which governs administrative review of certain procurement protests, defines "interested party" as "an actual or prospective bidder or offeror whose direct

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Pet. App. 63a-73a), is unavailing. In amending Section 1491(b)(1), Congress is presumed to have acted on the basis of the reported court of appeals decisions cited above, not on an unreported, interlocutory district court decision. See *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. 3551(2) (1994 & Supp. V 1999). Petitioners are not included in this definition.

The court of appeals' interpretation of "interested party" is further confirmed by the fact that, in enacting the ADRA, "Congress did not explicitly invoke the APA standing requirements, although it did explicitly invoke the APA standard of review." Pet. App. 13a (quoting 28 U.S.C. 1491(b)(4) (Supp. V 1999), which provides: "In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5"). The ADRA's standard of review provision demonstrates that Congress knew how to incorporate APA standards into the ADRA when it so desired. That Congress made no such incorporation with regard to the APA's standing provision, and instead adopted the narrower "interested party" standard used in the CICA, strongly supports the court of appeals' interpretation. Cf. *Lindh* v. *Murphy*, 521 U.S. 320, 327-331 (1997).

2. Moreover, even if petitioners were held to be "interested part[ies]" so as to establish jurisdiction under Section 1491(b)(1), they would still lack standing to challenge the DLA's cost comparison. As the Court of Federal Claims held (Pet. App. 35a-44a), potentially displaced federal employees and their unions are not within the zone of interests protected by the statutes

upon which petitioners rely. Petitioners invoke 10 U.S.C. 2462 and FAIR. See Pet. App. 21a.[4] Section 2462 directs the Department of Defense to obtain its goods and services from the private sector if a private contractor can provide them at a cost below the cost of providing them in-house, except where the Secretary of Defense determines that the goods and services must be provided by government personnel. FAIR requires all agencies to select a source for the activities they perform (other than inherently governmental functions) using a competitive process employing a "realistic and fair" cost comparison. FAIR § 2(d), 112 Stat. 2383.

The Court of Federal Claims correctly held that these statutes were enacted to provide the "best value to the American taxpayer," not to promote continued federal employment, a purpose that could frequently prove antithetical to the purposes of the cost-comparison provisions. See Pet. App. 40a. As both courts below correctly noted, and as explained above, the courts of appeals are uniform in holding that federal employees and their unions are not within the zone of interests protected by 10 U.S.C. 2462(b) or other general procurement statutes. Pet. App. 10a-12a, 40a-43a.

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[4] Petitioners do not claim standing based upon OMB Circular A-76. Pet. App. 33a n.18. To have standing, a plaintiff must be arguably within the zone of interests of a relevant statute or constitutional guarantee. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). Executive orders, such as the Circular A-76, cannot confer judicial standing. *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d at 1043.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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